

A Just and Lasting Peace: Supplanting Mediation with the Ombuds Model

SHIRLEY A. WIEGAND*

I. INTRODUCTION

Alternative Dispute Resolution (ADR) is experiencing incredible growth. ADR courses, clinics, conferences and seminars have proliferated. Law students are beginning to consider the field of ADR as a viable career option. Journals devoted solely to ADR have met with success,¹ and scholars have contributed more and more articles and essays to fill those journals. The American Bar Association has recently established a new ADR section. Yet, for many of us, ADR remains abstract, interesting and thought-provoking but not very relevant to our daily lives.

This article was conceived after its author was provided with an opportunity to "practice what she preached"—to put ADR to work within an organizational framework. The process forced a rethinking about ADR and resulted in the examination of one rather unfamiliar ADR mechanism and its relationship to the well-known, widely accepted practice of mediation. The article focuses on an ADR mechanism which has received little recent attention from lawyers interested in ADR, but which may nevertheless prove to be an effective ADR option: the ombuds office. Supplanting mediation with the ombuds model can produce an ADR mechanism strong in mediation, yet preferable to it.

Part II describes the circumstances which led the author to consider various ADR mechanisms. Part III describes the process chosen—the ombuds office—and traces its history and evolution. Part IV addresses the strengths and weaknesses of this process and Part V discusses both the widespread use and shortcomings of the more familiar ADR process of mediation. Finally, Part VI describes the advantages of the ADR process chosen to address the author's set of circumstances, namely the office of the

* Professor of Law, University of Oklahoma; Visiting Professor of Law, American University, 1996-97. While a Visiting Professor at Marquette University Law School during the 1995-96 academic year, I presented portions of this article to my colleagues there. They provided valuable comments and insight, and I wish to thank them. I also wish to thank Dr. Mary Rowe, ombudsperson at Massachusetts Institute of Technology and noted ombuds scholar, for her thoughtful and timely comments on earlier drafts of this paper. Dr. Larry Hill, a well-known ombuds scholar at the University of Oklahoma, also provided insightful comments, and I am grateful.

¹ The *Missouri Journal of Dispute Resolution* (now *Journal of Dispute Resolution*) began publication in 1984, and the *Ohio State Journal on Dispute Resolution* began the following year.

university ombudsperson,² with its strong focus on mediation. This article proposes that certain features of the classical ombuds office model be utilized for the challenges which often arise not only within an academic institution, but also within any large organization or agency.

II. STATEMENT OF THE PROBLEM

Like other academics, I serve on a variety of university committees. During a recent academic year, my service included membership on both the faculty governance executive committee and a committee created to redesign the faculty grievance process. In addition, I chaired a committee created to address gender and race equity issues on the university campus.

During the year, a variety of issues arose which demanded attention by at least one of these groups. Disputes often involved misperceptions, communication breakdowns, failure to understand process and frustration when a conflict went unresolved. Often a faculty member complained about an injury inflicted by a colleague: an insult, failure to value one's work, a racist or sexist remark or insensitivity. At times, the complaint involved the tenure, promotion or annual evaluation process. The complainant found it extremely difficult or inefficient to negotiate the procedures demanded by the faculty handbook, or the injury seemed to call for less drastic action than the filing of a formal complaint, or the complainant was the only woman or African-American faculty member in the academic unit and simply needed emotional support. Sometimes the bureaucratic structure itself was at fault.

In many instances, the options presented to the complainant seemed constrained, often inadequate or "superadequate," either an under-reaction or an over-reaction. I came to realize that the university's formal complaint process was not always the most effective means to handle the myriad problems inherent in a bureaucracy like the American university, nor, for reasons explained below, was mediation always the answer.

I began to explore whether an ombuds office might serve our needs. As a result of this exploration, I concluded that combining key elements of the classical ombuds office with the current mediation model within an organization or agency may yield not only more efficient results, but also "better" results.

² Historically, those who served in the ombuds office were male and were titled "ombudsmen." Therefore, when referring to the historical position, I use the term "ombudsman." But current ombuds practitioners are both male and female and, at least in this country, the more appropriate term is "ombudsperson" or "ombuds practitioner."

III. THE OMBUDS OFFICE

A. Origins

The office of the ombudsman has a long and varied history. In ancient times, Egyptian kings used complaint officers in their courts. Moses appointed such officers to respond to the complaints of the Hebrew people. During the Roman Republic, two censors heard complaints about the maladministration of those in power and served as watchdogs over administrative actions. In the Chinese Han Dynasty, the Control Yuan served the same function.³

The name "ombudsman" derived from practices of medieval Germanic tribes. In these decentralized, informal governments, only two punishments were available for convicted law-breakers: (1) they could be declared "outlaws," thereby permitting anyone to take their lives; or (2) they could be fined. If they were fined, the wrongdoer's family was expected to pay the fine to the victim's family. To avoid further conflict between the two families, a neutral third person was appointed to collect the fine and deliver it to the victim's family. "Imagine a Viking with horned helmet marching up to the door of a medieval Nordic hut. The man of the house answers the call, and then shouts back to his family: 'It's the man about the fine: the Ombudsman.'" ⁴ "Om" means "about"; ⁵ "bud" originates from "offering" or "bribe"⁶—one who visits regarding an offering is an ombudsman. Over time, the word came to refer to any kind of agent.⁷

It was not until the eighteenth century that the office was established in a form recognizable today and not until the nineteenth century that the office was formally designated "ombudsman." In 1713, the King of Sweden appointed an officer, the Chancellor of Justice, to investigate complaints against royal officials.⁸ In 1809, when Sweden adopted a democratic constitution, Parliament appointed the Justitieombudsman,⁹ a complaints officer to "supervise the observance of laws and statutes."¹⁰

³ See Gerald E. Caiden et al., *The Institution of Ombudsman*, in INTERNATIONAL HANDBOOK OF THE OMBUDSMAN: EVOLUTION AND PRESENT FUNCTION 9 (Gerald E. Caiden ed., 1983).

⁴ STANLEY V. ANDERSON, OMBUDSMAN PAPERS: AMERICAN EXPERIENCE AND PROPOSALS 2 (1969).

⁵ See *id.*

⁶ See THE OXFORD ENGLISH DICTIONARY 618 (2d ed. 1989).

⁷ See ANDERSON, *supra* note 4, at 2. See also Caiden et al., *supra* note 3, at 10.

⁸ See F.A. STACEY, OMBUDSMEN COMPARED 1 (1978).

⁹ See *id.*

¹⁰ Caiden et al., *supra* note 3, at 13.

As envisioned in Sweden in 1809, the ombudsman's role was to serve as an agent of the government, while at the same time supervising and prosecuting governmental wrongdoing. In later years, the role became that of a "citizen-defender, concerned with resolving public complaints against the public bureaucracy."¹¹ The complaints might entail illegal acts, but they could just as likely concern merely unethical or oppressive behavior by governmental agents against the citizenry. The Swedish Constitution required the ombudsman to possess "known legal ability and outstanding integrity."¹²

In 1919, The Office of Parliamentary Ombudsman, "a person distinguished in law," was included in Finland's constitution; and Denmark appointed its first ombudsman, pursuant to statutory law, in 1955.¹³ The Danish ombudsman must "keep himself informed as to whether any person comprised by his jurisdiction pursues unlawful ends, makes arbitrary or unreasonable decisions or otherwise commits mistakes or acts of negligence in the discharge of his or her duties."¹⁴

It is striking that more than one-hundred years passed between the initial adoption of the ombuds office in Sweden and its adoption in both Finland and Denmark, particularly in light of its rapid growth in the past two or three decades. During that initial period, the office experienced occasional modifications in response to changing times, but the original foundation and framework remain unchanged to this day. This original, unique dispute resolution mechanism deserves closer examination.

B. Role of the Classical Ombudsman

As envisioned in Sweden, Finland and Denmark, the ombuds office operates within a governmental structure. The ombudsperson is an "officer appointed by the legislature to handle complaints against administrative and judicial action,"¹⁵ serving as a watchdog over those actions. The ombuds office has retained this original function and continues to demonstrate these original essential characteristics: independence, expertise, impartiality, accessibility and powers of persuasion rather than control.¹⁶

¹¹ Caiden et al., *supra* note 3, at 10.

¹² Nancy C. Meymand, *The Ombudsman: An Extra-Bureaucratic Role* 49 (1980) (unpublished Ph.D. dissertation, Boston College).

¹³ See *id.* at 53. See also Donald C. Rowat, *Finland's Defenders of the Law*, in *THE OMBUDSMAN PLAN: ESSAYS ON THE WORLDWIDE SPREAD OF AN IDEA* 12, 12 (1973).

¹⁴ Caiden et al., *supra* note 3, at 13.

¹⁵ Donald C. Rowat, *The Ombudsman in Sweden*, in *THE OMBUDSMAN PLAN: ESSAYS ON THE WORLDWIDE SPREAD OF AN IDEA* 2, 2 (1973).

¹⁶ See ANDERSON, *supra* note 4, at 3.

SUPPLANTING MEDIATION WITH THE OMBUDS MODEL

Professor Larry B. Hill, a well-known expert on the characteristics of the classical ombuds office, provides the following “defining characteristics” of the office:

1. legally established,
2. functionally autonomous,
3. external to the administration,
4. operationally independent of both the legislature and the executive,
5. specialist,
6. expert,
7. nonpartisan,
8. normatively universalistic,
9. client-centered but not anti-administration and
10. both popularly accessible and visible.¹⁷

Professor Hill suggests, “[t]he Ombudsman can be thought of as a cybernetic device for mediating the relationships between the governors and the governed.”¹⁸ In this respect, the ombuds role includes a specialized form of mediation, which is an essential element of the role’s effectiveness.

When adopted by a country’s central national government, the traditional ombuds office is generally provided for in the country’s constitution. The ombudspersons are appointed by one or more branches of government, yet they maintain independence from all branches of government. Experts in law or government, ombudspersons serve as impartial, independent officials, usually of the legislative branch, whose *primary role* is to supervise administrative governmental actions. Both citizens and governmental officials have access to the ombuds office for the filing of complaints. Ombudspersons have power to investigate complaints, to issue reports about the complaints and to make recommendations for resolving the problem. But they have no power to make decisions, to order administrative officials to do something or to reverse administrative action; they have power only to make recommendations and to publicize their findings and recommendations. They seek solutions through the process of investigation and conciliation. The ombudsperson’s “authority and influence derive from the fact that he is appointed by and reports to one of the principal organs of state, usually either the parliament or the chief

¹⁷ Larry B. Hill, *Institutionalization, the Ombudsman, and Bureaucracy*, 68 AM. POL. SCI. REV. 1075, 1077 (1974).

¹⁸ LARRY B. HILL, *THE MODEL OMBUDSMAN: INSTITUTIONALIZING NEW ZEALAND’S DEMOCRATIC EXPERIMENT* 37 (1976).

executive."¹⁹

Currently, most ombudspersons observe confidentiality in their dealings with complainants. Although many of them will not accept anonymous complaints, they do assure complainants that the source of the complaint will be kept confidential unless the complainant agrees to disclosure of his or her name. Reports issued by the ombuds office delete the names of complainants and the governmental officials who are the subject of the investigation. There are exceptions to this protection in Sweden and Finland, where the cases are open to the public upon completion.²⁰

The goals of ombudspersons vary; at the most fundamental level, they hope both to solve citizen complaints and to improve public administration. But other goals have been articulated: to (1) "fulfill the latent function of reinforcing group identity" within a bureaucracy and to promote group solidarity by "bind[ing] the wounds of a torn academic community" (referring to a university ombuds office);²¹ (2) to save the time and expense of litigation and to protect and give "psychological security" to the citizenry;²² (3) to provide "new protections against bureaucratic bungling and abuses of power," serving "as a unique mechanism of democratic control over bureaucracy";²³ (4) to serve as an "essential instrument in the modern administrative state to reduce the gap between the administrators and the administered" and "to protect basic human rights against possible infringements by the public bureaucracy."²⁴

C. *Ombudsmania*

Since Denmark's adoption of the ombuds office in 1955, countries all over the world have followed the lead of the three Scandinavian countries which first adopted this mechanism. In 1962, Norway and New Zealand established national ombuds offices, followed by Australia (one state), Austria, Canada (seven provinces), Fiji, France, Ghana, Guyana, Hong Kong, Ireland, Italy, Japan, Mauritius, Netherlands, New Zealand, Nigeria,

¹⁹ Caiden et al., *supra* note 3, at 13. See also Paul R. Verkuil, *The Ombudsman and the Limits of the Adversary System*, 75 COLUM. L. REV. 845, 847 (1975).

²⁰ See Caiden et al., *supra* note 3, at 14.

²¹ Meymand, *supra* note 12, at 19-20.

²² See William B. Gwyn, *Transferring the Ombudsman*, in OMBUDSMEN FOR AMERICAN GOVERNMENT? 37, 41-42 (Stanley V. Anderson ed., 1968).

²³ DONALD C. ROWAT, *THE OMBUDSMAN PLAN: ESSAYS ON THE WORLDWIDE SPREAD OF AN IDEA* at vii-viii (1973).

²⁴ Gerald E. Caiden, *Introduction* to CAIDEN ET AL., *INTERNATIONAL HANDBOOK OF THE OMBUDSMAN: EVOLUTION AND PRESENT FUNCTION* at xvii (Gerald E. Caiden ed., 1983).

SUPPLANTING MEDIATION WITH THE OMBUDS MODEL

Pakistan, the Philippines, Portugal, Spain, United Kingdom and others.²⁵ In some countries, ombuds offices have jurisdiction only in large cities or only over certain governmental agencies. For example, in 1957 West Germany established an ombuds office for its armed forces. In Israel, a "state comptroller" eventually adopted an ombuds role, supplementing that country's appointment of a military ombudsman and Jerusalem's city ombudsman. In Switzerland, Zurich established an ombuds office in 1969.²⁶ By 1973, twenty-one countries had established ombuds offices or variations on the office. The concept also reached the United States and began to make its way into new and unforeseen areas such as nongovernmental offices and universities.²⁷ The rapid and widespread growth in ombuds offices from the 1950s until the 1980s prompted some observers to note that this period represented a "surge of ombudsmania."²⁸

As a result of its rapid growth, the ombuds office necessarily took on different characteristics, depending upon the needs and circumstances of the place and time. As developed in Sweden, the office is legislative rather than executive. All political parties must agree on the appointment of a particular ombudsperson, who then holds the office for four years but may serve additional four-year terms. The ombudsperson reports to the legislature. However, she is an impartial investigator and is politically independent, even from the legislature, and legislators are forbidden from intervening in the ombudsperson's investigations. The office is constitutionally established. Although the ombudsperson has no power to reverse or change an official act, she has tremendous influence in Sweden by virtue of her "objectivity, competence, superior knowledge and prestige."²⁹ The ombudsperson can begin an investigation based on citizen complaint or can act on her own initiative. In either event, the results of the investigation can be made known both to the legislature and to the press. The ombudsperson has authority to prosecute officials for illegal acts, although this power is rarely exercised.³⁰

Many citizen complaints in Sweden are resolved in this manner, including complaints from prison inmates or patients in mental hospitals. The process begins when the ombudsperson receives a letter from a

²⁵ See Peter J. Bayne & Julie A.M. Dawson, *The States*, in INTERNATIONAL HANDBOOK OF THE OMBUDSMAN: COUNTRY SURVEYS 7, 7-11 (Gerald E. Caiden ed., 1983); ROWAT, *supra* note 23, at vii; DONALD C. ROWAT, THE SPREAD OF THE OMBUDSMAN PLAN IN WESTERN EUROPE (International Ombudsman Institute Occasional Paper 21, 1983).

²⁶ See ROWAT, *supra* note 23, at vii.

²⁷ See *id.* at viii.

²⁸ Caiden et al., *supra* note 3, at 5.

²⁹ Rowat, *supra* note 15, at 4.

³⁰ See *id.*

complainant; in some cases, however, the ombudsperson can begin an investigation based solely upon information received from other sources, such as a story in the media. The ombuds office might find that the complaint has no merit and dismiss it. But if the complaint has merit, the ombuds office can recommend action.

When this basic process is transferred to other countries, it necessarily undergoes modification because of the differing legal systems and cultures. In the United Kingdom, a number of incidents necessitated the creation of an ombuds office, but scholars cite one incident in particular: the Crichton Down affair. This incident involved the taking of a citizen's land for military use with the proviso that, after the military use had ended, the owner would have an opportunity to regain his land. When the land was released, however, the owner was not given the promised opportunity. There were allegations of misbehavior by civil servants, and a minister eventually resigned. No laws had been broken, yet the result seemed unjust and sparked widespread outrage. The incident demonstrated procedural inadequacy and contributed significantly to the creation of the ombuds office.³¹

Unlike the Scandinavian model, in the United Kingdom the governmental ombuds office can act only in response to an individual's complaint. Citizens cannot directly gain access to the ombuds office but must instead contact a member of Parliament.³² But the essential components have remained remarkably similar to the first ombuds office established in Sweden in the nineteenth century.

D. *The Ombuds Office in the United States*

Perhaps the most remarkable characteristic about the ombuds office in this country has been its growth. Today, the United States has more ombudspersons than anywhere else in the world.³³ It is estimated that several hundred ombudspersons work in American and Canadian academic institutions and many more in public agencies and private organizations.³⁴

³¹ See Baroness B. Serota, *The Evolution of the Role of the Ombudsman—Comparisons and Perspectives*, in INTERNATIONAL HANDBOOK OF THE OMBUDSMAN: EVOLUTION AND PRESENT FUNCTION 27, 27-28 (Gerald E. Caiden ed., 1983). See also Larry B. Hill, *The Transference of the Institution of Ombudsman, with Special Reference to Britain* (1966) (unpublished M. Pol. Sci. thesis, Tulane University).

³² See Serota, *supra* note 31, at 29.

³³ See CAROLYN STIEBER, VARIATION ON A CLASSICAL THEME: THE ACADEMIC OMBUDSMAN IN THE UNITED STATES (International Ombudsman Institute Occasional Paper 38, 1987).

³⁴ See Mary P. Rowe, *Options, Functions, and Skills: What an Organizational*

SUPPLANTING MEDIATION WITH THE OMBUDS MODEL

For example:

Three dozen newspapers have an ombudsman. Nearly 4,000 hospitals have patient ombuds offices and a great many businesses have client or consumer complaint offices. Each state has a nursing home/long-term care ombuds structure, and there appear to be about 1,500 part-time and full-time ombudspeople attached to those offices.³⁵

Another remarkable characteristic is how this dispute resolution mechanism has undergone substantial changes in the transfer. Today's American ombudsperson may bear a substantial resemblance to the classical Swedish model—or it may bear almost none. It is fair to say that few, if any, of the American ombuds offices fit the classical model perfectly.

Much of the credit for importing the ombuds model into this country must go to two scholars. Professor Donald C. Rowat suggested its use as early as 1962³⁶ and Professor Walter Gellhorn published two books about the model just four years later.³⁷ This latter development received national attention when *Time* published an article describing the ombuds concept and noting the publication of Gellhorn's two books.³⁸ The article asked, "What champion can fight city hall, slash red tape and rescue the Little Guy from the insolence of Big Bureaucracy?"³⁹ The answer: the ombudsman.

In the 1960s, American interest in the classical ombuds office grew by leaps and bounds. Bills were introduced in both the national and state legislatures which would have established ombuds or ombuds-like offices in the federal and state governments. Ralph Nader introduced a Connecticut ombuds bill in 1963,⁴⁰ the same year in which Congressman Henry Reuss filed a similar bill in the House of Representatives.⁴¹ Senator Long

Ombudsman Might Want to Know, 11 NEGOTIATION J. 103, 113 n.2 (1995).

³⁵ Mary P. Rowe, *The Corporate Ombudsman: An Overview and Analysis*, 3 NEGOTIATION J. 127, 139 (1987).

³⁶ See generally Donald C. Rowat, *The Parliamentary Ombudsman: Should the Scandinavian Scheme Be Transplanted?*, 28 INT'L REV. OF THE ADMIN. SCI. 399 (1962).

³⁷ See generally WALTER GELLHORN, *OMBUDSMEN AND OTHERS: CITIZENS' PROTECTORS IN NINE COUNTRIES* (1966); WALTER GELLHORN, *WHEN AMERICANS COMPLAIN: GOVERNMENTAL GRIEVANCE PROCEDURES* (1966).

³⁸ See *The People's Watchdog*, TIME, Dec. 2, 1966, at 58, 60.

³⁹ *Id.* at 58.

⁴⁰ See HILL, *supra* note 18, at 9.

⁴¹ See Donald C. Rowat, *The Relevance of the Plan to the USA and Canada*, in THE OMBUDSMAN PLAN: ESSAYS ON THE WORLDWIDE SPREAD OF AN IDEA 68, 75 n.1 (1973) (Reuss' bill was numbered H.R. 7593 and called for the establishment of an "administrative counsel"). Reuss introduced similar legislation in 1967, renaming the position a

sponsored legislation in the Senate in 1967,⁴² and in 1971 Senator Javits, joined by four other Senators and Representatives Steiger and Reuss, introduced similar bills in both the Senate and House.⁴³ As envisioned by their drafters, federal legislative proposals would have relieved Congressional members of some of the burden of handling constituent complaints.⁴⁴ None of these bills passed.

But failure on the national level did not deter local efforts. The first ombudsperson in North America was established in Nassau County, New York, in 1966 and was called a "Public Protector." Professor Walter Gellhorn drafted an annotated model ombudsman statute and the Yale Legislative Services collaborated with the American Bar Association to produce a Model Ombudsman Statute for State Governments. Less than ten years after *Time* published its first article about the ombuds office, legislation had been introduced in all but eight states to implement the ombuds model in some fashion.⁴⁵ "Ombudsmania" had caught on in the United States.

The legal system took note. In 1969, the American Bar Association adopted a resolution which approved the use of ombuds offices for state and local governments and suggested experimentation at the federal level.⁴⁶ Two years later, a newly formed "Ombudsman Committee" of the A.B.A.'s Administrative Law Section issued a Development Report, noting "continued growth" in ombuds offices worldwide. The Committee also noted that colleges and universities in the United States had begun to establish such offices and reported that at least thirty-eight institutions had ombudspersons.⁴⁷

"congressional ombudsman." Donald C. Rowat, *Recent Developments in the USA*, in THE OMBUDSMAN PLAN: ESSAYS ON THE WORLDWIDE SPREAD OF AN IDEA 76 (1973) [hereinafter Rowat, *Recent Developments*].

⁴² See Rowat, *Recent Developments*, *supra* note 41, at 78. The bill was introduced was S. 1195. See *id.*

⁴³ See *id.* at 80. S. 2200 and H.R. 9562, known as the Administrative Ombudsman Experimentation Act, called for demonstration projects in three regions. The ombudsperson would be appointed by the House Speaker and Senate President after consultation with the majority and minority leaders. See *id.*

⁴⁴ See Henry S. Reuss & Everard Munsey, *The United States*, in THE OMBUDSMAN: CITIZEN'S DEFENDER 194, 195-196 (Donald C. Rowat ed., 2d ed. 1968).

⁴⁵ See HILL, *supra* note 18, at 11.

⁴⁶ See Rowat, *Recent Developments*, *supra* note 41, at 79.

⁴⁷ See Ombudsman Committee, *Development Report*, 1971-1972 A.B.A. SEC. OF ADMIN. L. 1, 16.

SUPPLANTING MEDIATION WITH THE OMBUDS MODEL

In 1967, Hawaii became the first state to establish an ombuds office, which continues to this day.⁴⁸ Iowa and Nebraska followed suit the same year, and Alaska followed six years later. In 1995, the Arizona legislature established the Office of Ombudsman-Citizens Aide.⁴⁹ At the same time, local governments had begun to investigate this innovative dispute resolution and avoidance device. The following cities and counties were among those who established ombuds or ombuds-like offices: Anchorage, Alaska; Cuyahoga County, Ohio; Detroit, Michigan; Fayette County, Kentucky (Lexington); Flint, Michigan; Jackson County, Missouri (Kansas City); Jamestown, New York; King County, Washington (Seattle); Montgomery County, Ohio (Dayton); New York City; and Wichita, Kansas. Puerto Rico and Guam also established offices. By 1980, some aspect of the ombuds model had been adopted in varying degrees by twenty-five states.⁵⁰

All of these offices shared some characteristics with the classic Scandinavian model, particularly in that they were governmental offices established to intercede between the government and its constituencies. But in the process of transferring the original national model to county and municipal offices, many changes took place. Local control often meant local responses to particularized needs, even though this response necessitated divergence from the classic ombuds model. For example, in 1995 in one state alone, legislation provided that ombudspersons be hired in areas relating to long term care, nursing homes, workers compensation, institutions and facilities for the mentally retarded and for the developmentally disabled, small businesses and minority businesses.⁵¹

⁴⁸ See Paul Dolan, *The Ombudsman in the United States: The States*, in INTERNATIONAL HANDBOOK OF THE OMBUDSMAN: COUNTRY SURVEYS 217, 218 (Gerald E. Caiden ed., 1983). See also HAW. REV. STAT. § 96-2 (1993).

⁴⁹ See ARIZ. REV. STAT. §§ 41-1371 to 41-2998.22 (1995). See also ALASKA STAT. §§ 24.55.010 to 24.55.340 (1995); IOWA CODE §§ 2C.1 to 2C.23 (1995) (here called the "Citizens' Aide"); NEB. REV. STAT. §§ 81-8,240 to 81-8,254 (1994) (here called the "Public Counsel").

⁵⁰ See Dolan, *supra* note 48, at 218. See also ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, *THE OMBUDSMAN: A PRIMER FOR FEDERAL AGENCIES* 3 (1991).

⁵¹ See OKLA. STAT. ANN. tit. 10 § 1415.1 (West 1995) (mentally retarded); OKLA. STAT. ANN. tit. 27A § 2-5-115 (West 1995) (State Air Quality Ombuds Office for Small Businesses); OKLA. STAT. ANN. tit. 63 § 1-818.27 (West 1995) (developmentally disabled or physically handicapped); OKLA. STAT. ANN. tit. 63 §§ 1-2211 to 1-2216 (West 1995) (Long-Term Care Ombudsman Act); OKLA. STAT. ANN. tit. 63 § 1-1816 (West 1995) (State Ombuds Office for Small Businesses); OKLA. STAT. ANN. tit. 63 § 1-1902 (West 1995) (nursing homes); OKLA. STAT. ANN. tit. 74 § 5010.3 (West 1995) (minority and disadvantaged business entrepreneurs); OKLA. STAT. ANN. tit. 85 § 3.9 (West 1995) (Workers'

Another state included ombudspersons for health service agencies, small business air quality compliance assistance, state department of corrections, mental health agencies, older citizens, families and crime victims.⁵²

These modified versions have been termed quasi-ombudsmen—"complaints officials [who] shar[e] many of the classical ombudsman's characteristics but lack . . . at least one structural feature considered fundamental to the institution."⁵³ In the United States, a quasi-ombuds office often lacks independence because it is too closely affiliated with a governmental supervisory official, such as a mayor or governor.⁵⁴ As a result, ombuds purists believe there are "few bona fide ombudsmen operating in the United States" today.⁵⁵ The five state ombuds offices most closely resemble the classical model.

For example, in Hawaii, the ombudsperson has many of the broad-ranging powers traditionally allocated to the classical ombuds model. "The ombudsman has jurisdiction to investigate the administrative acts of [state] agencies,"⁵⁶ but his jurisdiction does not include the judiciary, legislature, governor, lieutenant governor or county mayors or councils.⁵⁷ He is appointed by the legislature for a term of six years, up to a maximum of three terms, and can be removed prior to expiration of the term only by a two-thirds vote and only for neglect of duty, misconduct or disability. His salary may not be diminished while in office.⁵⁸ This framework provides the ombuds office with substantial independence from political vicissitude.

The Hawaii ombudsman "may investigate any complaint which the ombudsman determines to be an appropriate subject for investigation" and "may investigate on the ombudsman's own motion," if he believes it necessary.⁵⁹ Examples of appropriate subjects for investigation include administrative acts which are "[p]erformed in an inefficient manner" or are "[u]nreasonable, unfair, oppressive, or unnecessarily discriminatory, even though in accordance with law."⁶⁰ This aspect of the ombuds office closely resembles the office as it exists in the Scandinavian countries.

Compensation assistance).

⁵² See MINN. STAT. §§ 62Q.32, 116.98, 241.41, 245.91, 256.974, 257.0755, 611A.72 (1995).

⁵³ Larry B. Hill, *The Citizen Participation-Representation Roles of American Ombudsmen*, 13 ADMIN. & SOC'Y 405, 408 (1982).

⁵⁴ See *id.*

⁵⁵ Dolan, *supra* note 48, at 217.

⁵⁶ HAW. REV. STAT. § 96-5 (1993).

⁵⁷ See HAW. REV. STAT. § 96-1 (1993).

⁵⁸ See HAW. REV. STAT. § 96-2 (1993).

⁵⁹ HAW. REV. STAT. § 96-6 (1993).

⁶⁰ HAW. REV. STAT. § 96-8 (1993).

SUPPLANTING MEDIATION WITH THE OMBUDS MODEL

The ombudsman has the power to "make inquiries and obtain information as the ombudsman thinks fit, enter without notice to inspect the premises of any agency, and hold private hearings."⁶¹ He may "[c]ompel . . . by a subpoena, the appearance and sworn testimony of any person" who might have relevant information; "[c]ompel any person to produce documents, papers, or objects"; and "bring suit in an appropriate state court to enforce these powers."⁶² "The ombudsman is required to maintain secrecy in respect to all matters and the identities of the complainants or witnesses coming before [him] except so far as disclosures may be necessary to enable the ombudsman to carry out the ombudsman's duties and to support the ombudsman's recommendations."⁶³

After the investigation, the ombudsman "shall report" his opinion and recommendations to the agency if he finds any of the following: (1) The agency should consider the matter further; (2) The "administrative act should be modified or cancelled"; (3) "A statute or regulation . . . should be altered"; (4) "Reasons should be given for an administrative act"; or (5) "Any other action should be taken by the agency."⁶⁴

Like the classical ombudsmen, the Hawaii "ombudsman may present [his] opinion and recommendations to the governor, the legislature, the public, or any of these."⁶⁵ He receives immunity from judicial action.⁶⁶

Both Alaska's and Nebraska's ombuds statutes are very similar to that of Hawaii, except that Nebraska designates this position as "public counsel."⁶⁷ Iowa's ombuds office, however, has less autonomy and power by virtue of the fact that the ombudsperson (designated a "citizens' aide") holds office for just four years and "may at any time be removed from office by constitutional majority vote of the two houses of the general assembly."⁶⁸ Furthermore, both the governor and general assembly "may require disclosure of any matter and shall have complete access to the records and files of the citizens' aide."⁶⁹ The citizens' aide is forbidden from investigating an agency employee's complaint regarding his employment with the agency.⁷⁰

⁶¹ HAW. REV. STAT. § 96-9 (1993).

⁶² HAW. REV. STAT. § 96-10 (1993).

⁶³ HAW. REV. STAT. § 96-9 (1993).

⁶⁴ HAW. REV. STAT. § 96-12 (1993).

⁶⁵ HAW. REV. STAT. § 96-13 (1993).

⁶⁶ See HAW. REV. STAT. § 96-17 (1993).

⁶⁷ See ALASKA STAT. §§ 24.55.010 to 24.55.340 (1995); NEB. REV. STAT. §§ 81-8,240 to 81-8,254 (1994).

⁶⁸ IOWA CODE § 2C.5 (1995).

⁶⁹ IOWA CODE § 2C.8 (1995).

⁷⁰ See IOWA CODE § 2C.9 (1995).

Arizona's legislation creating the Office of Ombudsman-Citizens Aide became effective July 1, 1996,⁷¹ and exempts elected state officials and legislative staff.⁷² The ombudsman-citizens aide is selected by a committee consisting of state senate and house members of each party; representatives of large business, small business and consumer groups; and state employees.⁷³ The ombudsman-citizens aide serves for five years, may serve up to three terms and may be removed only by a two-thirds senate and house vote, "but only for neglect of duty, conviction of improperly divulging confidential information, misconduct or disability."⁷⁴ Powers and duties of the Arizona ombudsman-citizens aide are similar to those of the Hawaii office.⁷⁵ Arizona ombudsmen receive qualified immunity from civil suits and "shall not be required to testify in court regarding matters that come to their attention in the exercise of their duties except as may be necessary to enforce" the statute.⁷⁶ Presumably to facilitate autonomy, "[t]he office of ombudsman-citizens aide shall not be located within the state office building complex or adjacent or contiguous to any other state agency."⁷⁷

Thus, at least four of the five state models demonstrate a close alliance with the classical model of the ombuds office. The ombudsperson serves as an agent of government, supervising and prosecuting wrongdoing. He protects the citizenry against arbitrary or unreasonable governmental agency actions, even though such actions may be legal. The essential characteristics of an ombuds office are present to varying degrees: independence, expertise, impartiality, accessibility and powers of persuasion rather than control. But all of the state models exempt the actions of key elected officials, and four of them exempt the courts, from the ombuds' investigative power. Although legally established, it cannot be said that these offices are truly external to the administration of state governments, but they represent an excellent effort to serve as governmental watchdogs.

Although no other states have adopted the ombuds model to the same degree as these five states, the ombuds *idea* filtered down to particular subsets of state government. In response to disputes between prisoners and prison officials, the prison ombuds office was created. Nursing homes, prompted by the Older Americans Act of 1965,⁷⁸ also began to try this new

⁷¹ See ARIZ. REV. STAT. ANN. § 41-1371 (Supp. 1995).

⁷² See ARIZ. REV. STAT. ANN. § 41-1372 (Supp. 1995).

⁷³ See ARIZ. REV. STAT. ANN. § 41-1373 (Supp. 1995).

⁷⁴ ARIZ. REV. STAT. ANN. § 41-1375 (Supp. 1995).

⁷⁵ See ARIZ. REV. STAT. ANN. §§ 41-1376 to 41-1379 (Supp. 1995).

⁷⁶ ARIZ. REV. STAT. ANN. § 41-1380 (Supp. 1995).

⁷⁷ ARIZ. REV. STAT. ANN. § 41-1382 (Supp. 1995).

⁷⁸ See 42 U.S.C. §§ 3001 to 3058 (1995). Certain federal funding of state long-term

SUPPLANTING MEDIATION WITH THE OMBUDS MODEL

device, hoping in the process to defuse discontent and dissatisfaction before major problems erupted. This localized focus, although resulting in divergence from the classical model, created a powerful new ombuds model which offers many advantages over the traditional focus on litigation.

Private and public workplaces also began to adopt the ombuds model in response to changing times. The 1960s and 1970s experienced increased complexity in both private and public business worlds. Diversity created by the entrance of racial minorities and women into positions traditionally held by white men, changes in employment law, governmental regulation of workplace safety, judicial constraints on employment at-will practices and other changes in the workplace led public agencies and private enterprises to attempt to devise methods of resolving the growing number of internal workplace conflicts. At the same time, consumers' complaints became more demanding, and manufacturers and retailers began to search for ways to settle these external disputes quickly, cheaply and quietly.

Such organizations experimented with various conflict resolution devices and, in many cases, ended up with an ombuds-like office without any awareness that such a model existed elsewhere. Organizations nationally "reinvented the wheel" over and over, learning only later that others had adopted similar devices. In some cases, only after the fact were such devices labeled "ombuds" offices.⁷⁹

Today, hundreds of corporations and agencies have ombuds or ombuds-like offices for the settlement of both internal and external disputes, including McDonald's, Federal Express, AT&T, the IRS and Bank of America.⁸⁰ For the most part, these ombudspersons lack the independence of the classic ombudsman because they are hired by and report directly to top management. They often serve primarily as mediators and organizational trouble-shooters. They conduct informal in-house investigations and examine documents and data. Many conduct an "early neutral evaluation" to determine whether further action is required for a particular issue. They may recommend organizational changes. They are

care programs was conditioned on the establishment of state long-term care ombudsmen. See 42 U.S.C. § 3058g (1995).

⁷⁹ Telephone Interview with Mary P. Rowe, Ombudsperson at Massachusetts Institute of Technology (Apr. 18, 1996) [hereinafter Rowe Interview].

⁸⁰ See LINDA R. SINGER, *SETTLING DISPUTES: CONFLICT RESOLUTION IN BUSINESS, FAMILIES, AND THE LEGAL SYSTEM* 103 (1991); Victor Futter, *An Answer to the Public Perception of Corporations: A Corporate Ombudsperson?*, 46 BUS. LAW. 29, 41 (1990).

Early on, Isidore Silver adapted the ombuds concept to organizations and paved the way for the rapid increase in the number of organizational ombuds offices. See Isidore Silver, *The Corporate Ombudsman*, HARV. BUS. REV., May-June 1967, at 77 (arguing that the institution of the ombudsman could easily be applied to corporations).

called by different names—complaints officer, liaison or ombudsperson, among others—but the term “ombudsperson” or “ombuds practitioner” is becoming more widely used in the 1990s.⁸¹ They represent a fast-growing profession, currently numbering about 8,000 “ombudsman-like practitioners in North America.”⁸²

The federal government has also retained interest in the ombuds office. In June 1990, the Administrative Conference of the United States “recommended that all government agencies that interact frequently with the public consider establishing an ombudsman service to deal with grievances from the public.”⁸³ The recommendation resulted in a publication entitled *The Ombudsman: A Primer for Federal Agencies*.⁸⁴

Some state and federal agencies also have in place inspector general offices, which serve some of the functions of the classic ombuds office. For example, Florida’s executive branch includes the Office of Chief Inspector General, who is “responsible for promoting accountability, integrity, and efficiency in the agencies under the jurisdiction of the Governor.”⁸⁵ The Inspector General has power to “[i]nitiate, supervise, and coordinate investigations, recommend policies, and carry out other activities designed to deter, detect, prevent, and eradicate fraud, waste, abuse, mismanagement, and misconduct in government.”⁸⁶ Like the classic ombudsman, the Chief Inspector General has power to investigate agency

⁸¹ See Rowe Interview, *supra* note 79. See also STANDARDS OF PRACTICE, Standard 6 (The Ombudsman Association) (“Formal investigations—for the purpose of adjudication—should be done by others. In the event that an ombudsman accepts a request to conduct a formal investigation, a memo should be written to file noting this action as an exception to the ombudsman role.”).

⁸² JAMES T. ZIEGENFUSS, JR., ORGANIZATIONAL TROUBLESHOOTERS: RESOLVING PROBLEMS WITH CUSTOMERS AND EMPLOYEES xii (1988). The organizational ombudsperson may serve different clientele. The “client” ombudsperson serves as an intermediary between the organization and its clients: McDonald’s and its customers, for example. The “internal” ombudsperson serves as an intermediary between the organizational managers and its employees, or between co-employees. Some ombudspersons serve both functions. For example, a university ombudsperson may attempt to resolve disputes between students and the university (“client” ombudsperson) or between two employees or an employee and her boss (“internal” ombudsperson). See Rowe Interview, *supra* note 79.

⁸³ ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, THE OMBUDSMAN: A PRIMER FOR FEDERAL AGENCIES 1, 3 (1991). The Administrative Conference was established in 1964 “to promote improvement in the efficiency, adequacy, and fairness of procedures by which federal agencies conduct” their business. *Id.* at inside cover.

⁸⁴ See *id.*

⁸⁵ FLA. STAT. ch. 14.32(1) (1996).

⁸⁶ FLA. STAT. ch. 14.32(2)(a) (1996).

SUPPLANTING MEDIATION WITH THE OMBUDS MODEL

actions, to examine their records and "to receive complaints . . . concerning the possible violation of law or administrative rules . . . abuse of authority, [or] malfeasance."⁸⁷ But the Chief Inspector General is "appointed by and serve[s] at the pleasure of the Governor,"⁸⁸ suggesting a significant lack of independence.⁸⁹

The federal government includes many inspectors general, pursuant to the Inspector General Act of 1978.⁹⁰ The purpose of this Act is to create "independent and objective units . . . to conduct and supervise audits and investigations" of federal agencies.⁹¹ The inspectors general conduct both financial and performance audits, reporting the results to both the agency heads and Congress.⁹² These offices specialize in investigating and reporting, assuming in many respects a prosecutorial role. What they lack is the crucial mediation function which many ombuds offices currently view as their strength. Furthermore, critics have asserted that the inspector general investigations and audits "focus too much on small problems at the expense of larger systemic issues."⁹³

Other governmental offices have developed which serve in some respects the same functions as the ombuds office. For example, in California the commonlaw grand jury developed "as an instrument against despotism."⁹⁴ Although it "operates as part of the judicial branch of government, it obviously represents the people and not the judiciary insofar as its investigative and reporting powers are concerned."⁹⁵ It represents the people's "right to know about the workings of their state and local government including the activities of public officials in the performance of their official duties."⁹⁶ In these respects, the role of the California

⁸⁷ FLA. STAT. ch. 14.32(2) (1996).

⁸⁸ FLA. STAT. ch. 14.32(1) (1996).

⁸⁹ The District of Columbia also utilizes an Office of the Inspector General, but its focus appears to be on financial accountability, rather than on governmental conduct generally. See D.C. CODE ANN. § 1-1182.8 (1992).

⁹⁰ See 5 U.S.C.S. app. § 3 (Lawyers' Co-op. 1987).

⁹¹ 5 U.S.C.S. app. § 2 (Lawyers' Co-op. 1987).

⁹² See 5 U.S.C.S. app. §§ 2, 4(a)(5), 5 (Lawyers' Co-op. 1987).

⁹³ William S. Fields, *The Enigma of Bureaucratic Accountability*, 43 CATH. U.L. REV. 505, 517 (1994) (reviewing PAUL C. LIGHT, *MONITORING GOVERNMENT—INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY* (1993)).

⁹⁴ *McClatchy Newspapers v. The Superior Court of Fresno County*, 209 Cal. Rptr. 598, 604 (1985), *rev'd on other grounds*, 751 P.2d 1329 (Cal. 1988) (citing Richard H. Kuh, *The Grand Jury "Presentment": Foul Blow or Fair Play?*, 55 COLUM. L. REV. 1103, 1109-1110 (1955)).

⁹⁵ *McClatchy Newspapers*, 209 Cal. Rptr. at 604.

⁹⁶ *Id.*

commonlaw grand jury bears a striking resemblance to that of the classical ombuds office. But as with inspectors general, mediation is not included in the grand jury's function.

IV. CLASSICAL OMBUDSPERSONS V. QUASI-OMBUDSPERSONS

It is clear that in the past twenty-five years, the United States has embraced the ombuds idea. But before undertaking a closer examination of the university ombuds office, it might be helpful to review the various paths which the ombuds model has taken.

A. *Classical Ombuds Offices*

The classical ombuds office is the model which originated in the Scandinavian countries and is discussed earlier in this article. The office is established and maintained pursuant to constitutional or statutory directive. The ombudsperson is appointed by the legislature to serve as watchdog over governmental administrative and judicial actions. She maintains independence from all branches of government, investigates complaints, issues reports and recommends action. Investigation and mediation are integral functions of this office, as is public accountability. The five state ombuds offices in this country most closely resemble the classical model, although county or city ombuds offices might also have many of the classical ombuds characteristics.

B. *Quasi-Ombuds Offices*

Quasi-ombuds offices "shar[e] many of the classical ombudsman's characteristics but lack[] at least one structural feature considered fundamental to the institution. Most commonly, their *independence* is compromised in some fashion."⁹⁷

1. *Governmental Ombuds Offices Created by Law*

A host of ombuds offices have been created by statute or ordinance to serve as governmental watchdogs or liaisons between the citizenry and government. These include county or city ombudspersons, prison ombudspersons and state and local agency ombudspersons. Although these may include the key characteristics of the classical ombuds model, more

⁹⁷ Hill, *supra* note 53, at 408. Many of these quasi-ombudsmen, Professor Hill asserts, are "executive" ombudsmen who "come under the hierarchical authority of such officials as the governor, mayor, or city manager." *Id.*

likely they lack at least one fundamental structural feature of that model and must therefore be deemed "quasi" ombuds offices.

2. *Organizational Ombuds Offices*

Organizational ombuds offices lack several fundamental structural features of the classical model and are therefore "quasi" ombuds offices. Although they may exist in either public or private organizations, they are established without constitutional or statutory authority. They are created not through legislative action but through voluntary administrative action. Their creation, as well as their continuing viability, is not grounded in law. Thus, their independence is more easily compromised than that of the classical ombudsperson. In many cases, the opportunity for public accountability may also be lacking. The organizational ombudsperson generally conducts no formal investigation, issues no written reports and eschews publicity. She relies most heavily on mediation to resolve disputes.

Organizational ombuds offices are of two types: internal and external. Internal ombuds offices attempt to resolve disputes within the organization, between employees or between employees and management. External ombuds offices attempt to resolve disputes between the organization and its constituency or clientele. Some ombuds offices do both.

C. *The University Ombuds Office*

Along with the growing number of organizational ombuds offices which have developed as dispute resolution mechanisms, American universities signed on in the turbulent 1960s. Faced with an increasingly active, noisy and discontented student body, Michigan State University in 1966 became the first major educational institution to turn to the ombuds office as a potential dispute resolution mechanism.⁹⁸ The following year, the State University of New York in Stony Brook appointed three professors to serve as an ombuds committee to hear student and faculty complaints, and that same year the University of California at Berkeley selected a professor to serve one-half time as ombudsperson for student complaints.⁹⁹

An event which led to significant discussion of university ombudspersons, however, occurred after the shooting of students by the

⁹⁸ See Meymand, *supra* note 12, at 95. The first campus ombudsman at any American college or university may have been at Eastern Montana College, Billings, during the 1966-1967 academic year. See Kenneth L. Stewart, *What a University Ombudsman Does: A Sociological Study of Everyday Conduct*, 49 J. HIGHER ED. 1, 1 (1978).

⁹⁹ See THE OMBUDSMAN: CITIZENS' DEFENDER xv (Donald C. Rowat ed., 2d ed. 1968).

National Guard at Kent State University in 1970. The President's Commission on Campus Unrest was formed in response to that tragedy and to a similar event at Jackson State College. It issued a report in 1970 which described several dispute resolution mechanisms in place at universities, including the ombudsman. The ombudsman was described as

An individual who acts as a mediator and fact-finder for students, faculty members, and administrators. To be successful, the ombudsman must have both great autonomy and the support of the university president. He must not be penalized by the college administration if his findings and recommendations embarrass university leaders.¹⁰⁰

The Commission urged the use of mediation to resolve disputes.

The following year, the Carnegie Commission on Higher Education issued a report which included a number of recommendations including the appointment of

an individual or agency to inform members of the campus of the appropriate agency to hear their individual complaints and suggestions, and to assist them in being heard; ombudsmen or hearing committees composed of faculty, students, and administrators can serve this function. When the complaints are responded to, both the response and the rationale behind it should be made widely known.¹⁰¹

The report further suggested "the use of both ombudsmen and hearing officers," the ombudsman to be used to respond *informally* to faculty, student and administrator complaints, and the hearing officer to *formally* investigate and resolve disputes. "The ombudsman [chosen by a committee consisting of faculty, students and administrators] would independently attempt to resolve both academic and nonacademic grievances, as well as help individuals to use existing avenues for redress of grievances."¹⁰²

This report demonstrates an awareness of some of the key elements of the classic ombuds office: independence, expertise, impartiality, accessibility and powers of persuasion rather than control. But it focuses less on the citizen-defender role of the classical ombudsman and more on the role of peacemaker or dispute resolver, evident by its advocating some form of mediation or counseling and assistance in negotiating formal mechanisms already in place. Like other ombuds offices worldwide, it

¹⁰⁰ THE REPORT OF THE PRESIDENT'S COMM'N ON CAMPUS UNREST 205 (1970).

¹⁰¹ THE CARNEGIE COMM'N ON HIGHER EDUCATION, DISSENT AND DISRUPTION: PROPOSALS FOR CONSIDERATION BY THE CAMPUS 64 (1971).

¹⁰² *Id.* at 97.

represents one path to resolution of disputes, leaving open other formal proceedings. Although the differences seem great to some,¹⁰³ others have argued that the university ombuds office closely resembles the classical model.¹⁰⁴

The concept of university ombuds offices quickly caught on. By 1971, approximately sixty-five campuses had ombuds offices in some form, including seventeen in California alone.¹⁰⁵ By June 1982, over one-hundred colleges and universities had such offices.¹⁰⁶ Today, the University and College Ombuds Association has 137 members practicing at nearly one-hundred academic institutions in the United States.¹⁰⁷

What do these university ombuds offices look like? Are they effective? What are their goals? The answers to these questions vary significantly, reflecting the widespread confusion about this ADR mechanism.

For example, at Michigan State University, the first major university to establish an ombuds office, the ombudsperson is a senior faculty member who serves only students and follows a "nondirective" model.¹⁰⁸ This model takes three forms: detached investigator, enabler-facilitator and

¹⁰³ See, e.g., Larry B. Hill, *Ombudsman*, in 8 THE GUIDE TO AMERICAN LAW: EVERYONE'S LEGAL ENCYCLOPEDIA 82-83 (1984); LOUIS G. STAMATAKOS & OLAF ISACHSEN, TOWARDS MAKING THE UNIVERSITY OMBUDSMAN A MORE EFFECTIVE FORCE IN HIGHER EDUCATION: A COMPARATIVE STUDY 193 (1970).

¹⁰⁴ See, e.g., Stieber, *supra* note 33, at 1. Stieber examines ombudsman scholar Professor Larry Hill's directive and nondirective models of the ombuds office and finds that his nondirective model fits academia well. That model includes the detached investigator and enabler-facilitator, and includes referral to other persons or entities. The directive model, which includes a decision-making arbitrator, does not fit academia as well, Stieber suggests. *Id.* at 4-6.

¹⁰⁵ See Ralph Poblano, *Campus Ombudsmen in California Universities and State Colleges*, 52 PHI DELTA KAPPAN 580, 580 (1971).

¹⁰⁶ See Carolyn Stieber, *Resolving Campus Disputes: Notes of a University Ombudsman*, ARB. J., June 1982, at 5, 6. The authors of a 1972 article stated that at that time there were more than 190 college and university ombudsmen. See William T. Keating & James A. Holden, *The Campus Ombudsman: A Vehicle for Change?*, 6 J. RES. & DEV. IN EDUC. 38, 41 (1972). See also A. CLARE BUIE CHANEY, HOW TO ESTABLISH A CAMPUS OMBUDSMAN 13-14 (1982).

¹⁰⁷ See Electronic mail from Richard Hebein, President, University and College Ombuds Association, to Shirley Wiegand, Professor of Law, University of Oklahoma (Feb. 19, 1996) (on file with author) [hereinafter E-mail from Richard Hebein].

¹⁰⁸ See Stieber, *supra* note 33, at 4-6. Stieber bases her descriptions on the work of Professor Larry B. Hill, who has written prolifically about the ombuds concept. In her article, Stieber describes her role as Michigan State University's ombudsperson, a role she assumed in 1974. See *id.*

broker-negotiator.¹⁰⁹ One long-time ombudsperson at Michigan State¹¹⁰ considers the "directive" model—emphasizing the roles of arbitrator, advocate and political activist¹¹¹—inappropriate for the academic ombuds office.

At the California Institute of Technology (Caltech), the ombuds office began in 1986 and is open to the Caltech community, including its employees.¹¹² Caltech assures those who utilize the ombuds services that "[t]he Ombudsperson does not take sides, but considers the rights and interests of all parties involved in a dispute, with the aim of achieving a fair outcome. The Ombudsperson does not arbitrate, adjudicate, or participate in the formal grievance process."¹¹³ The "office is independent of all [Caltech] structures, while reporting to the Provost's Office on administrative and budgetary matters only."¹¹⁴

The two ombudspersons at the Massachusetts Institute of Technology (MIT)¹¹⁵ function in a system which is "mediation-oriented."¹¹⁶ They serve students and all non-union employees, including faculty and managers.¹¹⁷ They represent but one option of several in a multi-faceted dispute resolution system which focuses on "communications, counseling, fact-finding, conciliation, and mediation, with adjudication where necessary."¹¹⁸ These "quasi-ombuds" practitioners¹¹⁹ or "organizational ombudspersons,"¹²⁰ differ from the classical model ombudspersons in that

¹⁰⁹ See *id.* at 3-4. These descriptions were utilized in an ombuds survey during 1975-1977. See Larry B. Hill, *The Self-Perceptions of Ombudsmen: A Comparative Survey*, in INTERNATIONAL HANDBOOK OF THE OMBUDSMAN: EVOLUTION AND PRESENT FUNCTION 43, 50 (Gerald E. Caiden ed., 1983).

¹¹⁰ This ombudsman responded to an ombuds survey during 1975-1977.

¹¹¹ See Hill, *supra* note 109.

¹¹² See *Garstang v. The Superior Court of Los Angeles County*, 46 Cal. Rptr.2d 84, 89 (Cal. Ct. App. 1995) (involving the discovery of communications disclosed to the university ombudsperson).

¹¹³ *Id.* at 89 n.5 (citation omitted).

¹¹⁴ *Id.*

¹¹⁵ Ombudspersons at MIT were initially called "Special Assistants to the President." See Mary P. Rowe, *The Non-Union Complaint System at MIT: An Upward-Feedback Model*, 2 ALTERNATIVES TO THE HIGH COST OF LITIG., Apr. 1984, at 10, reprinted in LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 392 (1987).

¹¹⁶ See *id.* at 392.

¹¹⁷ See *id.*

¹¹⁸ Rowe, *supra* note 115, at 392.

¹¹⁹ See Hill, *supra* note 53, at 408.

¹²⁰ For a definition of "quasi-ombudsperson," see *supra* text accompanying note 97. See also Rowe, *supra* note 34, at 103, wherein Dr. Rowe, ombudsperson at MIT for the past

they do not conduct formal investigations nor do they write or publicize case reports.¹²¹ "Their purpose is to foster values and decent behavior—fairness, equity, justice, equality of opportunity, and respect."¹²² Although they favor neither the institution nor the complainant, they believe that "the institution has a common interest with people who have been wronged."¹²³ Ordinarily they do not initiate investigations, taking only those disputes presented to them by complainants; however, they have authority to act on their own initiative as well.¹²⁴ The MIT ombudspersons provide "upward feedback" to line managers (i.e., provide them with "data . . . which would be useful to managers to run their areas effectively and humanely") at the same time preserving the confidentiality and privacy of the parties involved in an individual dispute.¹²⁵

An ombudsperson at the University of Texas in the 1980s saw her "central responsibility" as representing "the individual—not necessarily as an advocate but as a neutral problem solver—in a complex bureaucracy."¹²⁶ In a 1974 article, the University of Kentucky's ombudsperson described his role as mediator of faculty-student disputes. He served a one-year term and was chosen from the faculty by a committee composed of two faculty members, three students and one administrative representative.¹²⁷

The ombuds office at the University of Alberta attempted to serve faculty, staff and students. That effort failed, perhaps because both faculty and staff already had "well-developed grievance processes."¹²⁸ But, as of 1983, the ombuds offices at the University of California campuses at Los Angeles, Riverside and Santa Barbara all served students, faculty and staff. Berkeley served only students and San Diego only staff. Most of the campuses in that state focused on student complaints, and the ombuds

23 years, draws a distinction between the classical ombuds office and the "organizational ombudsperson," who is "a confidential and informal information resource, communications channel, complaint-handler and dispute-resolver, and a person who helps an organization work for change." *Id.* She refers to herself as an organizational ombudsperson. *See id.*

¹²¹ *See* Rowe, *supra* note 34, at 105.

¹²² *Id.* at 103.

¹²³ Rowe, *supra* note 115, at 395.

¹²⁴ *See id.*; Rowe Interview, *supra* note 79.

¹²⁵ Rowe, *supra* note 115, at 397.

¹²⁶ CHANEY, *supra* note 106, at 5.

¹²⁷ *See* John L. Madden & Joseph Krislov, *A University Experience with Academic Ombudsmen*, 55 EDUC. REC. 110, 111 (1974).

¹²⁸ Donald C. Rowat & Geoffrey Wallace, *The Campus Ombudsman in North America*, in INTERNATIONAL HANDBOOK OF THE OMBUDSMAN: EVOLUTION AND PRESENT FUNCTION 151, 154 (Gerald E. Caiden ed., 1983).

offices were most likely to be filled with faculty.¹²⁹ That the offices are filled with faculty is not surprising, given that many ombuds offices on university campuses were established to deal with student unrest.

At Boston College, many of the problems brought to the ombudsperson in the 1970s involved the role of women on campus; at the University of San Francisco, they dealt with a lack of communication or respect for the rights of others, especially women and minorities. The primary role of the ombudsperson was that of mediator.¹³⁰

Northeastern University in Boston created a dispute resolution process for faculty grievances. One of the earliest steps involved investigation and mediation by the ombudsperson, if the complainant so requested. If those steps failed to resolve the dispute, the ombudsperson presented his findings *and recommendation* to the provost, who could implement the recommendation or take alternative action. The complainant could either accept the provost action or continue with the grievance process. During a seven-year period (1977-1984), one-third of all complainants sought assistance from the ombudsperson.¹³¹

Although some have attempted to characterize the university ombudspersons by noting, for example, that they "tend to be administrative appointees found in the upper echelon of the organization" and that their "constituents are primarily students,"¹³² a 1987 study of just thirteen Canadian universities and one Canadian college showed that "differences abound from office to office."¹³³

Generally, it can be said that today's American university or college ombudspersons are appointed by and report to the institution's president, "work mainly by conciliation" (although some "are trained mediators and use formal mediation") and "rarely make formal investigations . . . [or] formal recommendations because of [their] commitment to neutrality."¹³⁴

One of this country's most well-known and published university ombudspersons, Dr. Mary P. Rowe,¹³⁵ notes that "there are two common

¹²⁹ See *id.* at 155. At Sacramento State University, the ombuds office was created to serve "all segments of the college community (students, administrators, and staff)." Keating & Holden, *supra* note 106, at 42.

¹³⁰ See Meymand, *supra* note 12, at 107, 137.

¹³¹ See Sebastian T. Persico, *Dispute Resolution in Higher Education: The Use of Ombudsmanship, Mediation and Arbitration in the Settlement of Faculty Grievances* 82-83, 159 (1990) (unpublished Ph.D. dissertation, Harvard University).

¹³² Meymand, *supra* note 12, at 1.

¹³³ Christine McKee & Suzanne Belson, *The Ombudsman in Canadian Universities: And Justice for All*, 15 *STUD. IN HIGHER EDUC.* 197, 205 (1990).

¹³⁴ E-mail from Richard Hebein, *supra* note 107.

¹³⁵ Dr. Rowe has been a practicing ombudsperson for twenty-three years and is co-

kinds of ombudsperson today—the classical ombudsperson and the organizational ombudsperson.”¹³⁶ She focuses her research on the organizational ombudsperson:

An organizational ombudsperson is a confidential and informal information resource, communications channel, complaint-handler and dispute-resolver, and a person who helps an organization work for change. Organizational ombudspeople are employed by public and private institutions, agencies and corporations. Their purpose is to foster values and decent behavior—fairness, equity, justice, equality of opportunity, and respect.¹³⁷

Dr. Rowe has repeatedly surveyed organizational ombudspeople, noting that “ombudsmanry is a profession in evolution.”¹³⁸ She finds that ombudspeople serve as “mediators, counselors, and third party intervenors,” in addition to most of the other functions “that any dispute resolution practitioner can have.”¹³⁹ “[A]bout a third of the working time of organizational ombudspeople is spent on systems change—that is, working with line and staff managers to improve the supervision, human services, and conflict management systems of the organization.”¹⁴⁰ Dr. Rowe also notes that the organizational ombudsperson “often will be especially concerned with respect for those who are—or who see themselves as—less powerful than others in a given situation.”¹⁴¹

founder of The Ombudsman Association. She has written extensively about the organizational ombuds office. See, e.g., Rowe, *supra* note 34; Mary P. Rowe, *Options and Choice for Conflict Resolution in the Workplace*, in NEGOTIATION: STRATEGIES FOR MUTUAL GAIN 105 (Lavinia Hall ed., 1993); Mary P. Rowe, *The Post-Tailhook Navy Designs an Integrated Dispute Resolution System*, 9 NEGOTIATION J. 207 (1993); Mary P. Rowe, *The Ombudsman's Role in a Dispute Resolution System*, 7 NEGOTIATION J. 353 (1991); Mary P. Rowe, *Helping People Help Themselves: An ADR Option for Interpersonal Conflict*, 6 NEGOTIATION J. 239 (1990).

¹³⁶ Rowe, *supra* note 34, at 103.

¹³⁷ *Id.*

¹³⁸ *Id.* at 106.

¹³⁹ *Id.* at 105. “The exceptions are that organizational ombudspeople typically do not investigate formally for management for the purpose of adjudication; do not keep case records for the employer; and do not make management decisions.” *Id.*

¹⁴⁰ *Id.* at 110.

¹⁴¹ *Id.* at 103.

D. A Critical Examination of Ombuds Offices

Much of the criticism of the ombuds office is directed not at the classical model but at the transformation that has taken place as the office has been adopted by various organizational entities. Some have proposed that these transformed models no longer warrant the title of "ombudsmen," but instead should be termed "quasi-ombudsmen," because, although they share "many of the classical ombudsman's characteristics," they are "lacking at least one structural feature considered fundamental to the institution. Most commonly, their *independence* is compromised in some fashion."¹⁴² For example, a number of scholars have noted the lack of autonomy in university ombuds offices.¹⁴³ Obviously, if an ombudsperson serves at the whim of administrators, with little job security, he or she may be tempted to forego well-deserved criticism of administrative actions.

Another criticism of the ombuds office is that it is ineffective because its powers are limited. The classical model provides for investigations, recommendations and reports but not for direct enforcement. The office relies for enforcement upon its persuasive power, which results from its autonomy, expertise, neutrality and status. If any of these essential characteristics are lacking, the office's effectiveness may be diminished as well.

But criticism has also been leveled at the classical model. On the one hand, the ombuds office is an "essential instrument in the modern administrative state to reduce the gap between the administrators and the administered . . . to protect basic human rights against possible infringements by the public bureaucracy"¹⁴⁴ On the other hand, it serves as a "public pacifier, a device to assuage public critics of government operations at minimal cost without having to change anything fundamental,"¹⁴⁵ a "conservative and counter-revolutionary force, designed to make the existing order more palatable"¹⁴⁶ One scholar has suggested that by 1980 the ombuds idea had been "oversold." He described the ombuds model as

¹⁴² See, e.g., Hill, *supra* note 53, at 408.

¹⁴³ See, e.g., Rowat, *supra* note 41, at 84 (arguing that because the ombudspersons are usually appointed either by the administration or by students, they "often become advocates for either the administration or the students"); STAMATAKOS & ISACHSEN, *supra* note 103, at 190, 193.

¹⁴⁴ Caiden, *supra* note 24, at xvii.

¹⁴⁵ *Id.*

¹⁴⁶ See McKee & Belson, *supra* note 133, at 200.

SUPPLANTING MEDIATION WITH THE OMBUDS MODEL

[t]he fine tuner on the television. It can do nothing to change the channel. In fact, because the picture is made more bearable, we citizens may continue to stare dumbly at "All-Star Championship Wrestling" rather than make an effort to search for more meaningful fare. Ombudsmen may serve as a means of habituating us to our usual perceptions of the world, thus allowing free citizens to forget that grand responsibility of exploring alternative realities.¹⁴⁷

He adds, "Universities now hope that the [ombuds] office will stop students from occupying the dean's office."¹⁴⁸ Such criticism has been leveled at other informal dispute resolution processes as well.¹⁴⁹

Proponents of ombuds offices, and specifically the university ombuds office, have more faith in the institution, calling it a "conscience on the campus" which "helped to bind the wounds of a torn academic community" and which is capable of solving "all of the problems which basically confront a social system."¹⁵⁰ One study of Canadian university ombuds offices revealed that many university ombudspersons "are 'agents for change,' recommending modifications and improvements to rules, regulations, policies and practices which are unclear, inequitable or unfair."¹⁵¹ They serve as "advisors, counselors and educators . . . informing people of their rights, explaining about existing channels for grievance and appeals, and assisting people in the use of those procedures."¹⁵² They "provide a cost-effective, quick and informal route to resolve problems and grievances"¹⁵³ and can "be used as a useful and powerful tool for generating debate on institutional issues and as a catalyst for institutional reform."¹⁵⁴

¹⁴⁷ Robert Miewald, *Ombudsman and Citizen: A Critique*, in INTERNATIONAL HANDBOOK OF THE OMBUDSMAN: EVOLUTION AND PRESENT FUNCTION 77, 80 (Gerald E. Caiden ed., 1983).

¹⁴⁸ *Id.* See also Keating & Holden, *supra* note 106, at 38, 44 ("[R]adical students" fear it will "blunt the pressure for reform by acting as a safety valve . . ."); A. Clare Buie Chaney & James C. Hurst, *The Applicability and Benefits of a Community Mental Health Outreach Model for Campus Ombudsman Programs*, J. C. STUDENT PERSONNEL, May 1980, at 215, 216 (arguing that the ombuds office may be harmful because it masks the problem and prevents social change).

¹⁴⁹ See *infra* text accompanying notes 167-171.

¹⁵⁰ Meymand, *supra* note 12, at 20.

¹⁵¹ McKee & Belson, *supra* note 133, at 198.

¹⁵² *Id.*

¹⁵³ *Id.* at 199.

¹⁵⁴ *Id.* at 200.

Much of the confusion about the ombuds office lies in the varied ways in which it has been defined within various institutions. Clearly, the structure and goals of the organizational ombuds office of McDonald's differ from those of the legislatively established ombuds office of the state of Hawaii. The success or failure of any ombuds office depends, in part, upon how closely it follows the classical model, in what ways it differs and who holds the position of ombudsperson.

Given the differing perceptions of the effectiveness of this dispute resolution mechanism, what role should it play in ADR's future? How would it fit within a taxonomy of all dispute resolution mechanisms? Before addressing these questions, it is important to examine a closely-related dispute resolution mechanism which has currently come to occupy a substantial role in the ombuds concept—mediation. For it is because of mediation's deficiencies that the ombuds office presents itself as a viable, effective and important component of the ADR revolution.

V. MEDIATION: PEACE WITHOUT JUSTICE?

It is generally accepted that the growth of the movement within the legal profession was sparked by both quantitative and qualitative concerns. In the 1970s, a sense of urgency developed, but "[t]he decisive moment in the legalization of informal alternatives came in 1976, at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice," sponsored by the American Bar Association and others.¹⁵⁵ Judges and lawyers attending the conference (called the "Pound Conference" in honor of Roscoe Pound's 1906 address to the ABA entitled "The Causes of Popular Dissatisfaction with the Administration of Justice") discussed the increasing costs and delays of litigation and formed a task force which eventually recommended public funding of pilot programs which would utilize mediation and arbitration to resolve disputes.¹⁵⁶ Others joined the debate, urging innovative alternatives to traditional litigation.¹⁵⁷ Clearly, for clients who pay for unnecessary discovery and litigation arising

¹⁵⁵ JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* 123 (1983).

¹⁵⁶ See generally *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* (A. Leo Levin & Russell Wheeler eds., 1979).

¹⁵⁷ See, e.g., Derek Bok, *Law and Its Discontents: A Critical Look at Our Legal System*, REC., Jan.-Feb. 1983, at 12, reprinted in LEO KANOWITZ, *CASES AND MATERIALS ON ALTERNATIVE DISPUTE RESOLUTION* 33-36 (1985); Derek Bok, *A Flawed System*, HARV. MAG., May-June 1983, at 38, reprinted in Derek Bok, *A Flawed System*, 55 N.Y. ST. B.J. 8 (Oct. 1983); Warren E. Burger, *Isn't There A Better Way?*, A.B.A. J., Mar. 1982, at 274; Warren E. Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, 70 F.R.D. 83, 93-96 (1976).

from intense combat, the costs of escalating hostilities can be measured both quantitatively and qualitatively.

Quantitative concerns became even more apparent in the late 1970s and early 1980s when courts and commentators began noting an increase in the number of case filings, which overwhelmed many court dockets.¹⁵⁸ This perceived phenomenon was quickly labeled a "litigation explosion,"¹⁵⁹ sparking a variety of proposals to alleviate the new problem. These included accelerated discovery schedules,¹⁶⁰ an increased use of settlement conferences¹⁶¹ and novel devices such as the summary jury trial¹⁶² and court-annexed arbitration.¹⁶³

Among the devices pressed into service to alleviate the "litigation explosion" was one well-established dispute resolution mechanism—mediation. Until the 1980s, mediation in the United States was practiced almost exclusively in specific contexts, notably in community justice centers and labor industry disputes.¹⁶⁴ But the 1980s saw the mediation field expand into new areas and eventually into the court's repertoire.¹⁶⁵

In the past twenty years, the practice of mediation has proliferated in ways many could not have imagined. In the United States, both lawyers and

¹⁵⁸ See, e.g., Warren E. Burger, *Isn't There A Better Way?*, A.B.A. J., Mar. 1982, at 275.

¹⁵⁹ However, not everyone agreed that the litigation "explosion" was real. See, e.g., Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 63-65 (1983); Shirley A. Wiegand, *A New Light Bulb or the Work of the Devil? A Current Assessment of Summary Jury Trials*, 69 OR. L. REV. 87, 95-97 (1990).

¹⁶⁰ See, e.g., FED R. CIV. P. 16(a), 16(b), 26(a) & 26(f).

¹⁶¹ See, e.g., FED R. CIV. P. 16(a) & 16(c).

¹⁶² See Thomas D. Lambros & Thomas H. Shunk, *The Summary Jury Trial*, 29 CLEV. ST. L. REV. 43, 43 (1980). On March 5, 1980, Judge Thomas Lambros of the United States District Court for the Northern District of Ohio became the first federal judge to use this method. During a summary jury trial, the parties' lawyers present an abbreviated version of the evidence to a real jury, subsequently using the jury's "verdict" to assist in settlement negotiations. See *id.*

¹⁶³ Court-annexed arbitration was an integral part of the early pilot programs later authorized by 28 U.S.C. §§ 651-658. This dispute resolution process provides for the mandatory referral of particular types of cases to nonbinding arbitration. See BARBARA J. MEIERHOEFER, *COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS* 1, 15 (1990).

¹⁶⁴ See KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 19 (1994).

¹⁶⁵ Chief Justice Warren Burger, in his 1982 *Annual Report on the State of the Judiciary*, suggested "[d]ivorce, child custody, adoptions, personal injury, landlord and tenant cases, and probate of estates" as "prime candidates" for mediation and arbitration. See Burger, *supra* note 158, at 276.

clients now often assume that a case will be referred to mediation; in some instances, they suggest mediation without the court's prompting. Mediation has become an integral part of some forms of litigation: family, neighborhood and landlord-tenant disputes; small business disputes; some misdemeanor cases and a host of other conflicts. The number of mediators in this country alone is now estimated in the tens of thousands,¹⁶⁶ and those numbers continue to grow.

But this growth has not gone unchallenged. Numerous commentators have questioned the use of alternative dispute resolution in general. In 1983, Jerold S. Auerbach published a powerful critique of alternative dispute resolution,¹⁶⁷ in which he called ADR a "framework of backlash against the assertion of legal rights" by those disempowered citizens "who only recently had begun to litigate successfully to protect and extend their rights."¹⁶⁸ Auerbach clearly recognized that disparities in wealth and power led to disparities of result in the formal judicial system, but he noted that "diversion from the legal system is likely to accentuate that inequality."¹⁶⁹

Professor Owen Fiss was another of the early ADR critics. In 1984, he noted, "I do not believe that settlement as a generic practice is preferable to judgment or should be institutionalized on a wholesale and indiscriminate basis."¹⁷⁰ He raised concerns about coerced party consent, about agreements between agents without proper authority and about adequate judicial enforcement of agreements. He concluded that "although dockets are trimmed, justice may not be done."¹⁷¹

This section focuses primarily on Professor Fiss' concern with coerced party consent. Coerced party consent is a special, and perhaps the most serious, concern because parties have little recourse once they have entered, seemingly with consent, into a court-approved agreement. That concern is most frequently shared by other critics of alternative dispute resolution, critics of mediation in particular.¹⁷²

¹⁶⁶ See Richard C. Reuben, *Model Ethics Rules Limit Mediator Role*, A.B.A. J., Jan. 1996, at 25.

¹⁶⁷ See AUERBACH, *supra* note 155.

¹⁶⁸ *Id.* at 124-126.

¹⁶⁹ *Id.* at 144-145.

¹⁷⁰ Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984).

¹⁷¹ *Id.*

¹⁷² Professor Fiss' concern about settlement without authority focuses primarily on the authority (or lack thereof) of agents who purport to act on behalf of *groups* of people, such as racial minorities or consumer groups, resulting in a settlement by a few on behalf of the many. His concern about enforcement of court-approved settlement agreements focuses primarily on the difficulties of continuing court supervision and enforcement of structural reform consent decrees. Clearly, Professor Fiss is most mindful of the dangers of settlement

SUPPLANTING MEDIATION WITH THE OMBUDS MODEL

For example, Richard Delgado believes that mediation and other informal dispute resolution processes carry the potential to injure members of racial or ethnic minorities by denying them the formal safeguards which the judicial system offers.¹⁷³ These safeguards include the Code of Judicial Conduct, voir dire, peremptory challenges and procedural and evidentiary rules.¹⁷⁴ They also include the formality of the court system itself. "In some settings people feel free to vent hostile or denigrating attitudes toward members of minority groups; in others they do not."¹⁷⁵

The formalities of a court trial—the flag, the black robes, the ritual—remind those present that the occasion calls for the higher, "public" values, rather than the lesser values embraced during moments of informality and intimacy. In a courtroom trial the American Creed, with its emphasis on fairness, equality, and respect for personhood, governs.¹⁷⁶

Separating a dispute from both the physical confines of a formal courthouse and the formal procedural rules which govern ordinary disputes may result in an environment which encourages the expression and exercise of racist beliefs.

Others have voiced concerns about the impact alternative dispute resolution has upon the poor and disempowered. For example, Professor Richard Abel, a well-known voice of the critical legal studies movement, argues that informal dispute resolution mechanisms "neutralize conflict by responding to grievances in ways that inhibit their transformation into serious challenges to the domination of state and capital."¹⁷⁷ By erecting an informal system of dispute resolution, the state exercises its influence to assist in the resolution of some conflicts which might not have previously been subject to its reach. This has a tendency to release societal pressure

in *complex* cases involving large groups of persons represented by a few, although he argues that "the number of cases I am referring to is [not] trivial," nor would he tolerate dividing all cases into either "those [complex] lawsuits" which should not be settled, or *others*, which should be. *Id.* at 1087.

¹⁷³ See Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1360-1361, 1375-1391. See also AUERBACH, *supra* note 155, at 67-68 (arguing that informal dispute resolution might allow the middle class to dominate and control minorities).

¹⁷⁴ See Delgado et al., *supra* note 173, at 1367-1375.

¹⁷⁵ *Id.* at 1387.

¹⁷⁶ *Id.* at 1388.

¹⁷⁷ Richard Abel, *The Contradiction of Informal Justice*, in 1 THE POLITICS OF INFORMAL JUSTICE 267, 280 (Richard Abel ed., 1982).

which might otherwise have led to political upheaval, creating societal dependence upon the informal mechanisms and thereby strengthening the state's hand.¹⁷⁸

Other scholars question how well women fare in mediation, specifically in divorce or family mediation. Trina Grillo, while asserting that "[t]he family court system . . . can be relied on neither to produce just results nor to treat those subject to it respectfully and humanely," concludes that mediation does no better, and in fact can be "destructive to many women and some men."¹⁷⁹ Professor Grillo believes that family mediation "requires [the parties] to speak in a setting they have not chosen and often imposes a rigid orthodoxy as to how they should speak, make decisions, and be," thereby excluding their "authentic voices."¹⁸⁰

But Carrie Menkel-Meadow believes that "mediation as a process is not necessarily good or bad for women's interests; it depends on who the mediator is and what model of mediation is being used."¹⁸¹ Currently, although many courts direct litigants to mediation, the field is open to both qualified and unqualified mediators.¹⁸² A variety of ethical standards or

¹⁷⁸ See Boaventura de Sousa Santos, *Law and Community: The Changing Nature of State Power in Late Capitalism*, in 1 THE POLITICS OF INFORMAL JUSTICE 249, 260 (Richard Abel ed., 1982). See also AUERBACH, *supra* note 155, at 144; Richard Hofrichter, *Neighborhood Justice and the Social Control Problems of American Capitalism: A Perspective*, in THE POLITICS OF INFORMAL JUSTICE 207, 237-240 (Richard Abel ed., 1982).

¹⁷⁹ Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1549 (1991). See also Penelope E. Bryan, *Reclaiming Professionalism: The Lawyer's Role in Divorce Mediation*, 28 FAM. L.Q. 177, 207-218 (1994) (arguing that certain "high risk" divorce clients should avoid mediation).

¹⁸⁰ Grillo, *supra* note 179, at 1549-1550.

¹⁸¹ Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Woman's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 53 n.78 (1985). See also Carol Bohmer & Marilyn L. Ray, *Effects of Different Dispute Resolution Methods on Women and Children After Divorce*, 28 FAM. L.Q. 223 (1994) (asserting, *inter alia*, that when mediators are lawyers, results of divorce mediation closely reflect litigation outcomes, making women and children no worse off by using mediation rather than negotiation or litigation).

¹⁸² A long-awaited study of qualifications by the Society of Professionals in Dispute Resolution (SPIDR) issued in 1989 concluded that no single entity, but rather a variety of professional organizations, should establish qualifications; that the greater the degree of choice the parties have over the ADR process, the less mandatory should be the qualification requirements; and that the qualification criteria should be based on performance, rather than on paper credentials.

John Feerick et al., *Standards of Professional Conduct in Alternative Dispute Resolution*, 1995 J. DISP. RESOL. 95, 96.

SUPPLANTING MEDIATION WITH THE OMBUDS MODEL

codes of conduct have been adopted by a variety of organizations, but uniform standards have yet to become widely accepted.¹⁸³ Currently, "[t]he standards of conduct of individual professional groups are still the primary source of regulation in most states Such groups, however, lack enforcement power and have to rely upon the individual professions to undertake enforcement sanctions against one of their members."¹⁸⁴

Like Professor Menkel-Meadow, Professor Robert A. Baruch Bush believes that mediation is only as good as the mediator. While believing that mediation presents an opportunity to transform people and teach them to interact differently and positively in conflict,¹⁸⁵ Professor Bush at the same time acknowledges "the absence of any clear and demanding standards of practice for mediators, both in the context of initial training and as an ongoing guide to practitioner conduct."¹⁸⁶ He recognizes that the profession is "insufficiently professionalized and disciplined."¹⁸⁷

In attempting to devise a set of ethical standards, Professor Bush conducted interviews with approximately eighty mediators, focusing on "interpersonal neighborhood or community disputes, divorce and custody

¹⁸³ It has been argued that no one set of standards should be applied to mediation. For example, labor mediators generally deal with mediation challenges very different from those faced by divorce mediators. A variety of governmental entities and private organizations have drafted standards for mediators. These include the Florida Rules of Civil Procedure, Bar Rules of Professional Conduct and Rules of Discipline for Certified and Court-Appointed Mediators; the Hawaii Judiciary, Standards for Private and Public Mediators in the State of Hawaii; Association of Family and Conciliation Courts, Model Standards of Practice for Family and Divorce Mediation; Society of Professionals in Dispute Resolution (SPIDR), Ethical Standards of Professional Responsibility and the Center for Dispute Resolution of Denver, Colorado, Code of Professional Conduct for Mediators. See Robert B. Moberly, *Ethical Standards for Court-Appointed Mediators and Florida's Mandatory Mediation Experiment*, 21 FLA. ST. U.L. REV. 702, 704 n.15 (1994); Feerick et al., *supra* note 182, at 96 nn.4, 8. Recently, three prominent dispute resolution organizations—the American Arbitration Association, the American Bar Association and SPIDR—drafted proposed standards of conduct for mediators. See Feerick et al., *supra* note 182, at 96. And in late 1995, the American Bar Association Section of Dispute Resolution completed its draft of the first model ethical standards for mediators. They have so far been endorsed by the ABA Litigation Section, the American Arbitration Association and the Society of Professionals in Dispute Resolution. See Reuben, *supra* note 166, at 25.

¹⁸⁴ Feerick et al., *supra* note 182, at 96.

¹⁸⁵ See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 81 (1994).

¹⁸⁶ Robert A. Baruch Bush, *The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications*, 1994 J.-DISP. RESOL. 1, 1.

¹⁸⁷ *Id.*

conflicts, and disputed legal claims for civil damages.”¹⁸⁸ He found that the mediators faced a number of difficult situations with little guidance for resolving them. For example, they were unsure of the appropriate action when one party attempted to coerce another, when a lawyer coerced a client or even when a mediator attempted to coerce one of the parties.¹⁸⁹ “[T]he question is whether the mediator should push any party by any means in any situation, or whether there are limits on persuasive tactics, and if so what are those limits?”¹⁹⁰ Another area of concern had to do with party incapacity or ignorance of either the facts or the law.¹⁹¹

But the most disturbing question which these mediators raised echoes the concerns of others: What if the parties agree to a “bad” solution which the “mediator believes . . . is a ‘poor quality’ solution to the dispute” or that it is unfair because of “gross imbalance of power between the parties that leads the weaker party to accept an unfair solution?”¹⁹² Should the mediator interfere and thereby jeopardize neutrality? Should he withdraw as mediator? In other words, is a mediator’s primary concern with finality, with *resolution*, with “ending it”¹⁹³ or should he include in his concerns the achievement of justice or a fair result?

The American Bar Association’s recently drafted model ethical standards for mediators reflect a policy choice in favor of mediator neutrality over mediator involvement. According to the model standards, the mediator’s role is to “[r]ecognize that mediation is based on principles of self-determination by the parties,” rather than to offer an opinion of the likely result if the case were litigated.¹⁹⁴

Mediation can be empowering and justice-achieving if the parties are taught how to resolve other disputes and if it focuses on empowering a party so that he is able to use these skills in a greater community.¹⁹⁵ But, unfortunately, some mediators are evaluated (and evaluate their own skills) based upon the percentage of cases mediated to a final agreement.¹⁹⁶

¹⁸⁸ *Id.* at 2.

¹⁸⁹ *See id.* at 17-18.

¹⁹⁰ *Id.* at 20.

¹⁹¹ *See id.* at 20-21.

¹⁹² *Id.* at 24-25.

¹⁹³ In fact, a recent book about ADR seems to acknowledge this focus in its title. *See* SUSAN M. LEESON & BRYAN M. JOHNSTON, *ENDING IT: DISPUTE RESOLUTION IN AMERICA* (1988).

¹⁹⁴ *See* Reuben, *supra* note 166, at 25.

¹⁹⁵ In fact, Professor Robert A. Baruch Bush’s approach to mediation is not centered around reaching agreement as an end in itself; rather, he hopes to transform the way in which people interact in all conflicts. *See* BUSH & FOLGER, *supra* note 185, at 81.

¹⁹⁶ I reach this conclusion after numerous conversations with mediation practitioners and

SUPPLANTING MEDIATION WITH THE OMBUDS MODEL

Some would argue that justice is too ambiguous to define and that a "just" result is one which only the parties can define by the terms of their agreement. Thus, an agreement, because it *is* an agreement, is just. And that may be so in an ideal world: a world without power imbalance; without disparity in wealth and other resources; without racism, sexism, homophobia or age discrimination. But that is not our world.

Since the time of Plato and Aristotle, people have attempted to define justice. They speak of fairness, equity, impartiality and rightness. "*Justice* is still commonly used in the two primary senses, of giving every man his due, and of the setting right of wrong."¹⁹⁷ A just result must be one that would have been reached if both (or all) parties had equal bargaining power and operated in a world which does not disadvantage one of the parties on the basis of race, gender, religion, etc. The result must reflect an evenhanded, fair *process* as well as a fair result. The parties should all feel that they were heard and respected, and that the result was fair. A just result should benefit society generally, in addition to benefiting the parties themselves. A result which benefits only the parties may damage others, which is not just. For example, in a workplace, two parties may be involved in a dispute over pay or other benefits. Providing only one employee with a disputed benefit may damage those who also deserve it, but have not complained.

Mediation may resolve a specific dispute between two persons without repairing the underlying problem. It may involve purchasing the complainant's silence or satisfaction on a one-time basis, but it may also leave behind a festering wound which will infect others.

Particularly in a large organization governed by one body of rules, policies or regulations and administered by one managing body—federal, state or local government agency or department; private workplace; public or private school or university—it is inevitable that problems will recur. Any defect in the organizational structure or its employees will affect multiple personnel. One bad manager can create problems for all those over whom he has authority. One harassing employee may create a hostile environment for many of those with whom he works.

A formal complaint process may resolve some of the problems. Like litigation, it draws attention to the problem, ordinarily invoking formal, written procedures created to resolve organizational disputes. It pits the complainant against the wrongdoer in a formal battle, sometimes forcing

after attendance at numerous speeches given by mediators.

¹⁹⁷ J.P. Plamenatz, *Justice*, in A DICTIONARY OF THE SOCIAL SCIENCES 364 (Julius Gould & William L. Kolb eds., 1964). For a thorough discussion of the definition of justice, see LARRY B. HILL, REFORM, JUSTICE, AND THE OMBUDSMAN (International Ombudsman Institute Occasional Paper 17, 1982).

others in the organization to take sides and in some instances to testify for either the complainant or the responding party. The process is often lengthy and may be expensive. During the time committed to the process of resolution, hostilities and dissension increase. By the time the problem is resolved, one of the parties may have left the organization or transferred to another position within the organization. In any event, the organization as a whole has suffered irreparably.

Because such formal mechanisms often lead to significant disruption and animosity, aggrieved persons may choose not to complain at all. Like those who suffer an injury in the greater society and choose to forego litigation, workers may forego a formal workplace complaint process which carries with it too high a price. As a result, the organization may find that some of its more productive members leave, or suffer, or work less productively or become disgruntled, while the underlying problem goes unresolved.

In an effort to resolve problems which fail to find their way into formal dispute resolution mechanisms, many organizations have instituted mediation or conciliation procedures. These are designed to minimize confrontation, hostility, disruption and delay. They often keep disputes private and confidential. In fact, most mediators have an obligation to maintain the confidences of all parties involved in mediation unless the parties consent to disclosure. When a dispute is resolved, it is resolved privately.

The advantages of such a process are clear. Those parties who shunned the pandemonium of the formal grievance process may welcome the quiet whisper of mediation. Mediation provides them with an opportunity to be heard and with assistance in reaching an agreement for resolution of the conflict. When the parties have finished mediation, the conflict has been resolved.

The price paid for this method of resolution may not include disruption to the workplace, increased hostilities or loss of a good employee. Rather, the price may be measured in diminished justice. One party may never realize that he received less than a formal grievance might have provided, or that sexist or racist attitudes biased the result or that the other party was much more experienced in mediation techniques and thereby manipulated a more favorable result.

More importantly, even if this particular result was just, it may not have achieved an organizational benefit. In fact, the result reached may have satisfied both of the mediating parties at the expense of others in the organization. For example, a supervisor may agree that a female should have received a promotion or benefit and that denial of the promotion or benefit was unfair. Together they agree that she will receive favorable treatment at the next opportunity. Because the agreement is confidential,

SUPPLANTING MEDIATION WITH THE OMBUDS MODEL

other employees will never know that they are disadvantaged when competing for the promotion or benefit.

The organization suffers yet another disadvantage when mediation is the process of choice. Because of the secrecy surrounding the dispute itself, mediation addresses a particular dispute between two specific persons, but does little to attack an underlying problem which may be widespread. If the problem is a particular rule, policy or employee, others in the organization will eventually be affected and require intervention, either through mediation or through the formal grievance process.

In those situations when the formal grievance process offers too much and mediation too little, when the formal grievance process represents an overreaction and mediation an underreaction, the ombuds office may offer the optimal solution.

VI. THE OMBUDS OFFICE

An ombuds office which emulates as much as practicable the function and procedure of the classical ombudsman may minimize hostility and disruption while at the same time result in structural change which will alleviate similar problems in the future. The organizational ombuds office, as it has evolved, has focused primarily on its mediation role and, as a result, has shed some of the characteristics of the classical ombuds office model which has made the model so successful throughout the world. Closer reliance upon the key characteristics of the classical model offers an alternative clearly preferable to mediation alone.

In his 1983 publication, *Justice Without Law*,¹⁹⁸ Jerold S. Auerbach describes early uses of alternative dispute resolution:

The success of non-legal dispute settlement has always depended upon a coherent community vision. How to resolve conflict . . . is how (or whether) to preserve community. Historically, arbitration and mediation were the preferred alternatives. They expressed an ideology of communitarian justice without formal law, an equitable process based on reciprocal access and trust among community members. They flourished as indigenous forms of community self-government.¹⁹⁹

Auerbach refers to Utopian Christians and mercenary merchants as examples of such communities. They each "shared the understanding that law begins where community ends. So they developed patterns and institutions of dispute settlement that contained conflict within their own

¹⁹⁸ See AUERBACH, *supra* note 155.

¹⁹⁹ *Id.* at 4.

community boundaries—with courts and lawyers as remote as possible.”²⁰⁰ As long as disputes remained confined to homogeneous communities, nonlegal dispute resolution was successful. But when expanded to heterogeneous groups of people with divergent visions and values, “[t]he concept of justice loses the clarity it possessed in a communal context. Justice becomes a compromise that gives least offense to the most people.”²⁰¹

If one accepts the notion that “[o]nly when there is congruence between individuals and their community, with shared commitment to common values, is there a possibility for justice without law”²⁰²—or at least the notion that nonlegal dispute resolution has a greater likelihood of achieving justice in a homogeneous community—then ADR stands a greater chance of success in an organizational context. For example, those who work in a federal or state agency, or for a private employer, share certain work-related goals and values which might contribute to successful, justice-achieving ADR. In this sense, mediation should lead to just results. On the other hand, such workforces no longer consist primarily of white males with similar backgrounds and are in that respect more heterogeneous than in the past. In this context, mediation may not lead to just results. The ombuds model offers a greater possibility of achieving not only a final resolution of disputes but also a fairer result.

Assume, for example, that in a university history department one male faculty member engages in abusive behavior against a female faculty member or female teaching assistants. The behavior may or may not rise to the level of sexual harassment. If one of his victims initiates a formal grievance, she may ultimately win. If she does, she will no doubt have divided the history department between those who support the accused and those who support the accuser; over a period of many months, she will have focused much of her time and attention on the process, sacrificing her teaching and research projects; and she will most likely be treated as a pariah by many in the department. For some, the reward is worth the price.

But for the woman who is unwilling to pay the price, the only options may be to do nothing or to mediate. If she chooses mediation, the most likely outcome for this complainant is that the male faculty member will cease his objectionable behavior toward her. But mediation may not stop the behavior altogether. The accused may simply find other victims or exercise more discretion. His supervisors (in this case, the department chair or the university provost and president) may never learn of the problem, since mediation participants are bound to secrecy.

²⁰⁰ *Id.* at 5.

²⁰¹ *Id.* at 11.

²⁰² *Id.* at 16.

SUPPLANTING MEDIATION WITH THE OMBUDS MODEL

How would an ombuds office in the classical model handle the dispute differently? Disregarding the myriad of ways in which ombuds offices have been transfigured in this country, classically-modeled university ombudspersons would possess the following characteristics: They would have legal knowledge and experience and would possess a high degree of integrity.²⁰³ Training and experience in both the law and mediation would be helpful, but "multi-cultural experience" is just as important.²⁰⁴ They would be responsible for monitoring the organization's integrity and effectiveness, mindful not only of unlawful conduct, but also of arbitrary and unreasonable actions. They would serve as watchdogs over organizational members, including its administration, and would rely for their credibility on their independence, expertise, impartiality, accessibility and powers of persuasion rather than control.²⁰⁵

Ombudspersons would be given protection from summary dismissal in a way appropriate to the specific organization. For example, in a university setting, a panel of faculty, staff and administration officials might select the ombudsperson from an applicant pool. For those ombuds offices serving students as well, the selection panel would also include student representation. Or a panel of organizational members might select two or three candidates from a pool with the organization's top administrator selecting one from among these. The ombudsperson might be given a five-year appointment with reappointment upon a majority vote of the entire panel. Or the ombudsperson might be appointed by and report to the board of directors with the CEO having veto power over the chosen nominee.²⁰⁶

If the ombudsperson instead is appointed by the organization's president or chief executive officer and serves at her will, it might be difficult to overcome the appearance of pro-management bias. It will also be difficult for the ombudsperson to disregard her tenuous job security when making recommendations or deciding how thoroughly to investigate a particular complaint. Many organizational ombudspersons argue that the perception of bias is exaggerated. Pressures exist from all sides which tend to keep the ombudsperson relatively neutral; if the perception of such bias

²⁰³ See *supra* text accompanying notes 16-17.

²⁰⁴ See Rowe, *supra* note 115, at 400. Dr. Rowe states: "Multi-cultural experience is of such extraordinary importance as to commend more than one person at the end of the line, even if several people must serve part-time." *Id.* An example of this emphasis can be seen on the international level. Three Bosnians—a Muslim, a Croat and a Serb—currently serve as ombudspersons of the Federation of Bosnia-Herzegovina "to sift through and deal with the . . . claims of human rights violations within the federation." *A Voice for the People*, A.B.A. J., Mar. 1996, at 64.

²⁰⁵ See *supra* text accompanying notes 18-19.

²⁰⁶ See Futter, *supra* note 80, at 35.

exists, ombudspersons would soon be out of a job for lack of clients. Besides, many disputes within an organization do not involve management-employee disputes, but rather employee-employee disputes.²⁰⁷ Nevertheless, insulating the ombudsperson from unnecessary suspicion of bias offers the best chance of maintaining the office's credibility.

An ombuds office in the classical style would permit all members of the organization to have access to the ombuds office to file complaints. The ombudsperson would have power to investigate complaints, to issue reports about the complaints and to make recommendations for resolving the problem. In most cases, the report would protect the identity of those who are its focus. In other cases, the ombudsperson might believe it important to disclose that information. In some countries, ombudspersons furnish the public with case reports,²⁰⁸ providing a measure of trust in and credibility of the organization as a whole.

Issues of ombuds confidentiality have received attention recently in the United States. In contrast to the classical ombuds model, organizational ombudspersons generally do not issue reports or disclose any information about the persons involved. They maintain strict confidentiality in their dealings with their clients.²⁰⁹ Confidence is maintained most likely because organizational ombudspersons currently focus primarily on their role as informal dispute resolvers, and mediators and have adopted many of mediation's characteristics.

As with mediation, confidentiality at the initial stages is protected. Most organizational ombudspersons

do not keep case records for the employer and they resist appearing as witnesses in judicial proceedings. Ombudspeople maintain that there is (or should be) a privilege which belongs to the office Many ombudspeople have an agreement with their employers that the employer will not call the ombudsperson in its own defense.²¹⁰

Attempts to breach ombuds confidentiality have been rebuffed in a variety of ways. In *Shabazz v. Scurr*,²¹¹ a federal court recognized a limited state law privilege to prevent disclosure of confidential information held by

²⁰⁷ See Rowe Interview, *supra* note 79.

²⁰⁸ See *supra* text accompanying note 20.

²⁰⁹ See Rowe Interview, *supra* note 79.

²¹⁰ Rowe, *supra* note 34, at 104. See also STANDARDS OF PRACTICE, Standards 1, 3 and 3.3 (The Ombudsman Association) ("We base our practice on confidentiality We assert that there is a privilege with respect to communications with the ombudsman An ombudsman keeps no case records").

²¹¹ 662 F. Supp. 90 (S.D. Iowa 1987).

a prison ombudsman.²¹² Likewise, in *Kientzy v. McDonnellDouglas Corp.*,²¹³ the court protected the confidential communications made to a McDonnellDouglas Corporation ombudsperson.²¹⁴ In both *Shabazz* and *Kientzy*, the courts based their decisions upon Federal Rule of Evidence 501 ("privilege . . . shall be governed by the principles of the common law as they may be interpreted by the courts . . .").²¹⁵ The *Kientzy* court articulated the balancing of the common law principles regarding privilege utilized by both courts:

(1) the communication must be one made in the belief that it will not be disclosed; (2) confidentiality must be essential to the maintenance of the relationship between the parties; (3) the relationship should be one that society considers worthy of being fostered; and (4) the injury to the relationship incurred by disclosure must be greater than the benefit gained in the correct disposal of litigation.²¹⁶

The *Kientzy* court found all four principles satisfied.²¹⁷

Although such judicial creation of privileges is permitted in federal courts, state courts may lack that discretion. In those cases, courts may instead find that the ombudsperson's mediation function brings it within a statutory mediation privilege, if such exists. In *Garstang v. Superior Court of Los Angeles County*,²¹⁸ the plaintiff attempted to compel discovery of communications disclosed to a California Institute of Technology ombudsperson.²¹⁹ The court found that the statutory mediation privilege did not apply because it required that all parties execute an agreement in writing prior to mediation; no such writing had been executed.²²⁰ The court, however, proceeded to find the communications protected under a qualified

²¹² See *id.* at 94.

²¹³ 133 F.R.D. 570 (E.D. Mo. 1991). An unreported case, *Roy v. United Technologies Corp.*, Civil No. H-89-680 (JAC) (D. Conn. May 29, 1990), is considered the "seminal case recognizing both the federal common law privilege and the implied contract basis for barring the disclosure of ombuds' communications." Charles L. Howard & Maria A. Gulluni, *The Ombuds Confidentiality Privilege: Theory and Mechanics*, THE OMBUDSMAN ASSOC. 3 (1996).

²¹⁴ See *Kientzy*, 133 F.R.D. at 611.

²¹⁵ See *Shabazz*, 662 F. Supp. at 91; *Kientzy*, 133 F.R.D. at 571.

²¹⁶ See *Kientzy*, 133 F.R.D. at 571. See also *In re Doe*, 711 F.2d 1187, 1193 (2d Cir. 1983). See generally *Shabazz*, 662 F. Supp. at 90.

²¹⁷ 133 F.R.D. 570, 571 (E.D. Mo. 1991).

²¹⁸ 46 Cal. Rptr.2d 84 (1995).

²¹⁹ See *id.* at 86.

²²⁰ See *id.* at 87.

privilege based on the state constitutional right of privacy.²²¹

Still other courts have based ombuds communication protection on an implied contract theory, because those who visit the ombuds office do so upon the promise of confidentiality.²²²

Obviously, those ombuds offices created by statute may find the necessary protection from state court disclosure within the statute which created them.²²³

It is clear that confidentiality is of utmost importance to present day American organizational ombudspersons, even though such emphasis is lacking in the classical ombuds model. As discussed below, strict adherence to total confidentiality may not offer the greatest chance for justice-achieving dispute resolution.

Regardless of how confidentiality issues are resolved, adherence to the classical model would require the ombudsperson to investigate the complaint. In some instances, she may decide that no further action is warranted. In other cases, further investigation might lead to exercise of some form of "organizational subpoena" power.

As with the classical model, ombudspersons would have no power to make decisions or to order organizational members to do something or to reverse official action; that power would be reserved for the formal complaint process. Ombudspersons would seek solutions through the process of investigation, conciliation and persuasion.

They would explore options and assist the complainant in exercising her options. When problems recur, they would recommend changes in policies, rules or practices. Their authority and influence would derive from the fact that they are appointed by a cross-section of organizational members and report ultimately to the organization's top administrator.²²⁴ Their reporting ordinarily would include only that information required for administrative and budgetary purposes.

Ombuds offices would have not merely as their goal the resolution of individual disputes. Rather, they would seek to solve individual complaints while at the same time improving organizational effectiveness. As envisioned in the original classical model, they might also promote group

²²¹ See *id.* at 90.

²²² See generally *Roy v. United Technologies Corp.*, Civil No. H-89-680 (JAC) (D. Conn. May 29, 1990) (recognizing both a federal common law privilege and implied contract); *Criado v. IIT Corp.*, 61 Fair Empl. Prac. Cases (BNA) 321 (S.D.N.Y. 1993). Both cases are discussed in detail in Howard & Gulluni, *supra* note 213, at 3-7.

²²³ See, e.g., ALASKA STAT. § 24.55.260 (1993) (regarding Ombudsman's privilege not to testify).

²²⁴ See, e.g., Caiden et al., *supra* note 3, at 13.

SUPPLANTING MEDIATION WITH THE OMBUDS MODEL

identity and group solidarity;²²⁵ save the time and expense of formal grievance procedures; protect and give "psychological security" to the group members;²²⁶ provide "new protections against bureaucratic bungling and abuses of power"; serve "as a unique mechanism of democratic control over bureaucracy";²²⁷ serve as an "essential instrument in the modern administrative state to reduce the gap between the administrators and the administered" and "protect basic human rights against possible infringements by the public bureaucracy."²²⁸

In fact, The Ombudsman Association, formed in 1982 as the Corporate Ombudsman Association, has Standards of Practice that provide ombudspersons "advocate for fair processes and their fair administration," "identify new problems" and "provide support for responsible systems change."²²⁹ The Ethical Principles for University and College Ombudspersons provide: "An ombudsperson is guided by the following principles: objectivity, independence, accessibility, confidentiality and justice; justice is pre-eminent."²³⁰

The ombudsman historically has not been seen as a muted, facilitating neutral sitting silently by until called into service by the parties' hostile silence, then coaxing the parties into continued communication until they reach an agreement. The office includes not only these characteristics, but also much more. Initially, classical ombudspersons listen to the complainant. Then they investigate. Then, if they find the complaint legitimate, they engage others in resolution of the dispute. They may require the production of records and witnesses from anyone in the organization, including the top administrators. Once they find the complaint legitimate, they assume their role as "citizen defenders."

In some respects the office resembles a grand jury or inspector general, intent on protecting positions of public trust from corruption, misconduct and mismanagement.²³¹ The ombudsperson's concern is not to protect the organization's reputation; rather it is to help ensure that all of the organization's members conduct themselves in a manner neither arbitrary, dishonest, illegal, disruptive nor unethical. Unlike litigation, the role of an ombuds office is not viewed as a battle of adversaries. And unlike a mediator, ombudspersons can take sides, not in favor of the complainant

²²⁵ See Meymand, *supra* note 12, at 19.

²²⁶ See Gwyn, *supra* note 22, at 42.

²²⁷ See ROWAT, *supra* note 23, at vii-viii.

²²⁸ See Caiden, *supra* note 24, at xvii.

²²⁹ STANDARDS OF PRACTICE, Standards 5.3 & 8 (The Ombudsman Association).

²³⁰ ETHICAL PRINCIPLES FOR UNIVERSITY AND COLLEGE OMBUDSPERSONS 1. Ideally, "justice" includes substantive justice, as well as procedural justice.

²³¹ See *supra* text accompanying notes 85-93.

and against the respondent, but in favor of honesty, integrity, legality and principle. Their client is integrity. Therefore, when the university female faculty member or teaching assistant mentioned above complains to the ombudsperson, his role will not end if he finds that the conduct does not rise to the level of a federal Title VII sexual harassment violation. If the ombudsperson finds instead that the conduct demonstrates merely poor judgment but that it nevertheless disrupts the workplace or interferes with the optimal productivity of coworkers, he can take action.

His actions may involve mediation between the two parties. They may involve individual counseling only with the respondent. They may involve conducting interviews with others or gaining access to university records. The ombudsperson may discover that the female complainant has a history of asserting unfounded allegations or that the male has had several other accusations leveled against him. The ombudsperson's role ideally is to determine whether a problem exists and to remedy it. He may end the investigation shortly after it begins, or he may launch a full-scale investigation and issue a report at its conclusion.

Empowering the ombuds office to its fullest extent inevitably involves the controversial confidentiality issue. It is clear that present day organizational ombudspersons have opted for mediation's model of privileged communications. But for the ombuds office to achieve its full potential for justice-achieving dispute resolution, it also seems clear that the office should not be absolutely and completely cloaked in secrecy. A return to the classical model would provide for confidentiality as far as possible and for limited disclosure when essential. For example, the ombuds statute at issue in *Shabazz v. Scurr*²³² provided that the ombudsperson "maintain secrecy in respect to all matters including the identities of the complainants or witnesses . . . except that the General Assembly, any standing committee of the General Assembly or the Governor may require disclosure of any matter and shall have complete access to the records and files of the [ombudsperson]."²³³

Although such unbridled disclosures should not be countenanced, providing the ombudsperson with limited discretion to disclose confidential information to specific high-ranking officers or directors when absolutely necessary, while protecting as much as possible the identity of the individuals involved, may provide the ombudsperson with the ability to produce a just result and effect structural or systems change. Obviously, permission to disclose confidential information is preferable, and a trusted, skilled ombudsperson is well-positioned to obtain such permission. But in

²³² 662 F. Supp. 90 (S.D. Iowa 1987). The statute at issue was Iowa Code §§ 601G.8, 601G.20 (1985). *See id.*

²³³ *Shabazz*, 662 F. Supp. at 91 (citing IOWA CODE § 601G.8 (1985)).

SUPPLANTING MEDIATION WITH THE OMBUDS MODEL

rare instances, the ombudsperson should be authorized to make limited disclosure even without permission taking care to withhold information which would reveal party identities.

In addition to limited disclosure, the classical ombudsperson also possesses the power to publicize governmental wrongdoing, a power unlikely to find acceptance within private or even public organizations in the United States today. But the possibility of organization-wide publicity could empower the ombuds office. In some cases, the ombudsperson may find the conduct so egregious that such publicity is warranted, although she would protect the identity of the parties. Publicity is most appropriate when the ombudsperson has discovered a problem which does not involve an individual in the organization but rather a general policy or practice which should be changed. For example, had a British ombuds office been in place to remedy the Crichton Down affair,²³⁴ the ombudsman could have issued a public report which recommended new guidelines, policies or even legislation to guide the government in its dealings with private landowners.

It has also been suggested that the ombudsperson have the right to appeal to the organization's governing board or agency if her recommendations are not satisfactorily followed and that the ombudsperson "have the *theoretical right* to comment in the proxy statement or the annual report."²³⁵ "Further, where a serious violation of law was involved and was being allowed to continue without correction, he would have the right [but not the duty]—after exhausting all his internal remedies—to take the matter up with the appropriate public agency."²³⁶

Another significant function of the ombuds office includes assistance with process informing the complainant of other methods of resolution and the action required to initiate and employ some other method. Indeed, a complaint heard frequently during this author's university service was an inability to understand and negotiate the formal grievance procedure. The ombuds office might well determine that the complainant prefers to file a formal complaint and might therefore assist her in initiating that procedure. In the alternative, the ombuds office could assist the complainant in developing additional options.²³⁷

The organizational ombuds office by necessity differs in some respects from the classical model, but the most effective office would involve the

²³⁴ See *supra* text accompanying note 31.

²³⁵ Futter, *supra* note 80, at 38.

²³⁶ *Id.*

²³⁷ Developing options is a key focus of the ombuds office at the Massachusetts Institute of Technology and of the Standards of Practice for organizational ombudspersons. See Rowe, *supra* note 34; Rowe, *Options and Choice for Conflict Resolution in the Workplace*, *supra* note 135, at 108.

most minimal of differences. Rather than involving the affairs of a national or state government, the organizational ombudsperson has jurisdiction over a "micro universe"—the organization. Thus, "subpoena" power stems not from the national or state government, but from the organizational governing body.

When the organization is public rather than private, its powers may well be statutory, set forth in the legislation which governs the organization. "The office will thereby be completely independent of the . . . administration and have its own source of law."²³⁸ Establishment of the office by statute provides it with autonomy and protects it from the budget ax or the whim of dissatisfied administrators. Separate funding from the governing body, rather than from the funds available to one or two administrators for distribution to various units, also contributes to the office's independence.

A private organization is unlikely to have at its disposal statutory restraints. It is incumbent upon such an organization to mimic as much as possible the self-restraints of a public organization meaning that attempts should be made to build ombuds autonomy and independence into the organization's governing documents and structure.

For all ombuds offices, physical as well as fiscal independence from any one constituency serves the laudable goal of minimizing the appearance of bias. For example, at a university, the ombuds office might be placed in the library building or some other neutral spot rather than located down the hall from the administrative offices or in a faculty building. It should also be separately staffed at every opportunity emphasizing the independence this office has from any one constituency.

The ombuds office offers several advantages over the use of a narrow mediation focus. The ombudsperson will in many cases serve as a mediator. But if mediation fails or if the problem is likely to recur and involves a faulty policy or employee, the role of the ombudsperson differs from the role of mediator. Rather than serving as a communications facilitator, assisting the parties in reaching an agreement, the ombudsperson serves as an organizational watchdog, assisting not only these parties but also the efficient, effective functioning of the organization and all its parts, *including* these individuals. The ombudsperson is neither a silent neutral nor an advocate for the complainant.

Wherever the [classical] ombudsman has functioned, he has been purely and plainly an advocate of sound administration, not an advocate of the position of the complainant The ombudsman . . . is simply stationed at the margin, as it were, between the citizen and the official, and he must

²³⁸ Rowat & Wallace, *supra* note 128, at 152.

SUPPLANTING MEDIATION WITH THE OMBUDS MODEL

be concerned with seeing that justice is done to public servants as well as to the public whom they serve.²³⁹

The ombudsperson can *seek out* problems before they are presented to him, at all levels of the organization, including the administrative level. The ombudsperson seeks to assure all organizational constituents that their psychological security and basic human rights have a defender. The ombudsperson focuses not so much upon past actions but upon the future of the organization and its constituents. "Since . . . the primary purpose of the external critic [ombudsman] is to build for the future rather than to exhume the past, constructive suggestions about the avoidance of similar controversies may not be precluded by inability to reach a firm conclusion about guilt in the present instance."²⁴⁰ The ombudsperson is accountable for his response to problems within the organization and must provide a rationale for any recommendations or actions taken. Unlike the silent, invisible mediator, the ombudsperson who follows the classical model may be proactive and public.²⁴¹

The power of the ombuds office also differs from that of a mediator. Typically, mediation proponents

deploy the discourse of interests and needs. They reconceptualize the person from a carrier of rights to a subject with needs and problems, and in the process hope to move the legal field from a terrain of authoritative decision making where force is deployed to an arena of distributive bargaining and therapeutic negotiation.²⁴²

Thus, mediation parties may be redefined as "individuals with interpersonal or psychologically based problems" rather than as "rights-bearing subjects."²⁴³ An employee who suffers sexual or racial

²³⁹ WALTER GELLHORN, *THE OMBUDSMAN CONCEPT IN THE UNITED STATES, OUR KIND OF OMBUDSMAN* 13 (1970).

²⁴⁰ GELLHORN, *OMBUDSMEN AND OTHERS: CITIZEN'S PROTECTORS IN NINE COUNTRIES*, *supra* note 37, at 432.

²⁴¹ Many, if not most, organizational ombudspersons do not take a proactive approach to dispute resolution. Instead, they discuss the problem, ask questions, explore options and may make informal recommendations. *See* Rowe Interview, *supra* note 79. Dr. Rowe states that the powers of reason and persuasion are very powerful. Often a simple informal request for records produces marked changes in conduct. *See id.*

²⁴² Susan Silbey & Austin Sarat, *Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstruction of the Juridical Subject*, 66 *DENV. U.L. REV.* 437, 479 (1989).

²⁴³ Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil*

discrimination or harassment should not be expected to compromise with the harasser to reach an agreement in a mediation. The employee should be informed of her options, including her right to file a formal legal complaint; if she chooses not to do so or if the harassment or discrimination may be difficult to prove in a court of law, she should know that something will be done to stop the behavior. An ombuds office can take action, investigating the wrongdoing and recommending action, either to the wrongdoer or, in exceptional circumstances, to the CEO, or to the organization's governing board. The ombudsperson should advise the complainant and the wrongdoer of the actions taken. The ombuds office's power to publicize wrongdoing, either within the organization or to the public at large (depending upon the type of organization and the nature of the problem), serves as the sword of Damocles, encouraging prompt action.

As with any dispute resolution mechanism that falls short of full-fledged adversarial litigation, the ombuds concept may not satisfy those who insist that litigation is the only legitimate means to resolve disputes. But it clearly addresses more of the critics' concerns than does mediation.

Rather than simply settling a dispute between two or more parties, the classically-modeled ombuds office seeks to achieve justice and integrity. Because the ombudsperson possesses both legal and mediation skills²⁴⁴ and experience, he is more likely to anticipate and recognize power imbalances and deception and to possess the ability to deal with them.

Because the ombudsperson has power to conduct an independent investigation, including the power to "subpoena" witnesses and documents, there is far less risk of party coercion. Unlike the mediator who takes the parties at their word, the ombudsperson has the power and duty to investigate the facts fully and is therefore more likely to uncover latent power imbalances.

If "[j]ust results are accurate results . . ."; if "[t]he determination of 'certain' or 'true' results is central to adjudication results and processes [and] [t]he process of fact finding is essentially a quest for truth or

Rights in the Workplace, 27 L. & SOC'Y REV. 497, 504 (1993). See also RICHARD HOFRICHTER, *NEIGHBORHOOD JUSTICE IN CAPITALIST SOCIETY: THE EXPANSION OF THE INFORMAL STATE* 132 (1987).

²⁴⁴ There is lively debate within mediation circles about the requisite skills which mediators should possess. Lawyer-mediators advocate a law degree as a minimal qualification, while non-lawyers argue that lawyers are actually *less* qualified than non-lawyers because they are trained to be adversarial and non-neutral, while non-lawyers can easily learn the minimal law required to serve as a neutral. Lawyer-mediators respond that knowing the law is crucial, and that mediation skills can be learned fairly quickly. Most ombudspersons would agree that mediation skills and legal knowledge are helpful, regardless of whether or not accompanied by a particular college degree.

SUPPLANTING MEDIATION WITH THE OMBUDS MODEL

reality,"²⁴⁵ then the ombuds office with its broad investigatory power is more likely than mediation to achieve justice. It is also more likely that a party will be more truthful if he knows that the ombudsperson has the resources and expertise to ascertain the truth. The ombuds office carries with it the potential to satisfy those who argue that present ADR processes produce results that "may be qualitatively defective due to a lack of information needed to produce 'accurate' results."²⁴⁶

Ensuring that the ombudsperson is sensitive to multicultural perspectives or, better yet, that culturally diverse ombudspersons participate together in a dispute which involves culturally diverse parties, serves to allay some of the legitimate concerns which have been expressed about mediation. In this respect, having multiple ombudspersons offers advantages over litigation, where the judge's decision or jury's verdict may reflect the decisionmakers' personal biases.

The ombudsperson's independence contributes as well to the assurance that those who represent a minority position will receive assistance. Just as a federal judge with lifetime tenure may more easily resist the pressure of prevailing public sentiment than a state judge who is subject to election every few years, so too may the ombudsperson feel free to resolve a dispute contrary to the prevailing winds. In fact, one well-known ombudsperson has stated that the ombud's purpose "is to foster values and decent behavior—fairness, equity, justice, equality of opportunity, and respect," and that the "ombudsperson often will be especially concerned with respect for those who are—or who see themselves as—less powerful than others in a given situation."²⁴⁷ Given that the ombudsperson's responsibility is to the organization as a whole, attending to the complaints of all constituents is more likely to advance the organization's interests than to permit grievances of even a minority of the constituents to fester.

The independence and status of the ombuds office also increases the likelihood that it will be perceived as a more formal process than mediation, thereby discouraging the expression of racist or sexist attitudes.²⁴⁸ An ombudsperson who reports directly to the highest level of administration and has the kind of power proposed herein is more likely to reflect higher societal values.

Critics of alternative dispute resolution who assert that it may inhibit political upheaval, increase societal dependence upon informal mechanisms and thereby strengthen (in this case) the organizational hand, may not find

²⁴⁵ Edward Brunet, *Questioning the Quality of Alternate Dispute Resolution*, 62 TUL. L. REV. 1, 34 (1987).

²⁴⁶ *Id.* at 55.

²⁴⁷ Rowe, *supra* note 34, at 103.

²⁴⁸ See *supra* text accompanying notes 173-176.

the ombuds office any more acceptable. In fact, such critics may find it even more objectionable because the resolution mechanism is "controlled" by the organization itself. For example, a university ombudsperson is ultimately hired by and answerable to a university provost, president or governing board.

But the current alternative to both formal and informal in-house mechanisms (including the ombuds office) is formal adjudication. As long as such adjudication continues to represent an enormous outlay of time, emotion and money, most complaints will not be heard there. ADR critics recognize this current dilemma but anticipate that when the situation gets bad enough, workers will revolt and throw off their chains. Thus, major structural change will occur.

Such is not the current climate. Labor unions have lost members and power in recent years and continue their four decade-long decline.²⁴⁹ Many workers are grateful to have jobs at all, even with declining wages. Rather than await the revolution, alternatives to litigation must be available. And the ombuds office represents a more effective alternative than mediation. Furthermore, because of the ombudsperson's experience, skills and independence, she is more likely to effect structural or organizational change for the benefit of the employees.

Another criticism of employers' usual internal complaint procedures is that "the rhetorics of management and therapy are far more pervasive in organizational complaint handlers' accounts [and that] there is almost no language about legal rights."²⁵⁰ This observation could well be made about dispute resolution mechanisms based primarily on a mediation model. But historically, such criticism has not been made about the classical ombuds office. That office, endowed with expertise, autonomy and power, has been one of activism, emphasizing the role of "citizen defender," structural reformer and watchdog.

In a recent study of the Hawaii ombudsman's office, at least 372 complaint cases involving reform were recorded over a period spanning fifteen years. Additionally, another 110 cases were identified as "appearing" to involve an administrative reform.²⁵¹ Fifty-three percent of those reforms were deemed "substantive" rather than merely procedural;

²⁴⁹ See Steven Greenhouse, *Unions Looking South to Find New Members*, N.Y. TIMES, Feb. 20, 1996, at A13; Peter T. Kilborn, *With New Militancy, Nation's Unions Hope to Drive Republicans from Congress*, N.Y. TIMES, Feb. 19, 1996, at A10.

²⁵⁰ Edelman, *supra* note 243, at 529-530 (interviewing complaint handlers in ten organizations).

²⁵¹ Larry B. Hill, *The Ombudsman and Bureaucratic Reform 2* (Aug. 28-31, 1986) (paper presented at 1986 Annual Meeting of The American Political Science Association, Washington, D.C.).

SUPPLANTING MEDIATION WITH THE OMBUDS MODEL

twenty-four percent of those involved amending a law, regulation or policy or codifying rules; fifteen percent involved requiring compliance with an existing law, regulation or policy.²⁵² The goal of this ombuds office was clearly not limited to preserving the peace or bringing about resolution. Given this strong record, it appears that the office of the ombudsperson may not only treat the symptoms of a diseased bureaucracy; it may serve as the cure for the underlying illness itself.

VII. CONCLUSION

It would be foolhardy to suggest that one dispute resolution mechanism—litigation, mediation or arbitration, among others—is most appropriate for all disputes. Disputes and disputants vary wildly. The past fifteen years have produced a variety of techniques for problem-solving, but mediation appears to have led the field, gaining many devoted adherents. However, just as litigation may not best resolve some disputes, neither may mediation.

Although the 1960s and 1970s saw a dramatic increase in the growth of the ombuds office in the United States, the ombuds office seems to have been overlooked by ADR proponents in the 1980s mediation boom. This article suggests that reliance upon the classical ombuds characteristics offers significant advantages over mediation in some contexts, most particularly within an organization or bureaucracy. This article also proposes that the organizational ombuds office, as it has developed in the United States, has strayed too far from the classical model. A closer alliance with the classical ombuds model may result not only in resolution of disputes but may also better reflect just results and effect beneficial structural change.

²⁵² See *id.* at 3.

